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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

THOMAS G. KOCH,
Petitioner,

Versus

CITY OF HUTCHINSON, KANSAS, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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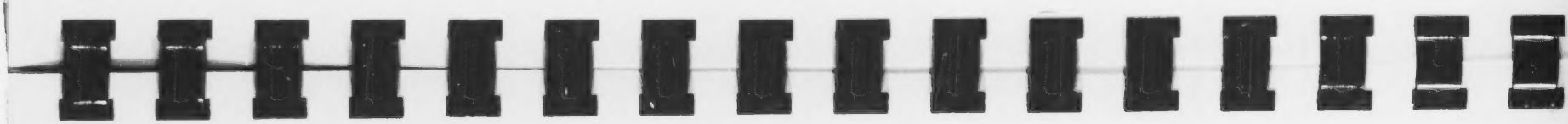

QUESTIONS PRESENTED FOR REVIEW

ISSUE NO. 1: Whether the majority improperly construed its duty, to make an independent examination of the whole record to determine if the speech was protected as a matter of law, as a duty or right to retry "historical" facts and to usurp the jury's decision on the fact issues properly presented to it.

ISSUE NO. 2: Whether the majority improperly conducted the Pickering balance in this case because:

(A) that issue was never raised and such balancing was never requested by respondents before the trial court until after the jury's verdict;

(B) the Pickering balancing should not have been conducted in the absence of a concession by respondents that petitioner's

speech was the substantial or motivating factor in his demotion; (C) by balancing in favor of respondents because:

(i) in doing so the court retried the "historic facts";

(ii) in doing so the court placed undue significance on the fact that petitioner's speech was done in the context of an official report; and,

(iii) in doing so the court found that conduct other than petitioner's speech was disruptive and justified respondents demoting petitioner, whereas Pickering requires that the speech itself be inherently disruptive before the employer can restrict the speech.

ISSUE NO. 3: Whether the majority in fact improperly made a per se rule that speech made as part of official duties or

included in official reports is not protected; or, if this Court agrees that no such per se rule was in fact established, whether the majority erred in placing undue significance on that factor and balancing that factor against petitioner; or in making a rule that that factor should always be balanced against the employee.

ISSUE NO. 4: Whether the majority erred in finding that petitioner's speech -- made in an official report and constituting a finding that a fire which resulted in the death of an unattended small child was the result of arson -- was not a matter of public concern, and therefore not protected as a matter of law.

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Speech Was The Substantial Or Motivating Factor In His Demotion; (C) By Balancing In Favor Of Respondents Because: (i) In Doing So The Court Retried The "Historic Facts"; (ii) In Doing So The Court Placed Undue Significance On The Fact That Petitioner's Speech Was Done In The Context Of An Official Report; And (iii) In Doing So The Court Found That Conduct Other Than Petitioner's Speech Was Disruptive And Justified Respondents Demoting Petitioner, Whereas Pickering Requires That The Speech Itself Be Inherently Disruptive Before The Employer Can Restrict The Speech.

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[1]/The parties herein are: Thomas G. Koch; City of Hutchinson; and, former defendants: Dallas Jones; George Pyle; Joan Schrag; Bill Bornholdt; Ralph Gingrich; John Corey; and, Dan Robinson. The League of Kansas Municipalities, Topeka, Kansas, appeared as amicus curiae before the Tenth Circuit. See Rule 21.1(b).

OPINIONS BELOW

On September 2, 1983, a special verdict was entered in favor of petitioner, finding that his protected speech was the substantial or motivating factor for his demotion; that plaintiff would not have been demoted but for such protected speech; that the City of Hutchinson, Kansas, was liable for the demotion; and that the then remaining defendants (Pyle and Jones, City Manager and Fire Chief) were not liable for the demotion and had acted in good faith; and awarding plaintiff actual damages of $100,000.00.

On October 19, 1983, the trial court granted defendant City's motion for judgment notwithstanding the verdict, finding that plaintiff's speech was not protected. On November 2, 1983, the trial court denied petitioner's motion to amend or alter that judgment.

On March 27, 1987, a 3-judge panel of the Tenth Circuit Court of Appeals reversed the trial court's order granting defendant City's motion for judgment notwithstanding the verdict, finding that petitioner's speech was protected, with a dissenting opinion. On April 29, 1987, rehearing en banc was granted to the City. On June 2, 1988, the Tenth Circuit majority reversed the 3-judge panel's decision and affirmed the trial court's order granting judgment notwithstanding the verdict, with a dissenting opinion.

GROUNDS FOR JURISDICTION

This petition results from a decision by the Tenth Circuit Court of Appeals, on rehearing en banc, reversing a majority opinion of a 3-judge panel of that court, with a dissenting opinion on rehearing. The en banc majority upheld the trial court's order granting respondents' motion for judgment notwithstanding the verdict.

A copy of the en banc decision of the Tenth Circuit Court of Appeals, dated June 2, 1988, is found at **APPENDIX "A"**. The order of the Tenth Circuit granting rehearing en banc, dated April 29, 1987, is found at **APPENDIX "B"**. A copy of the 3-judge panel of the Tenth Circuit Court of Appeals, dated March 27, 1987, is found at **APPENDIX "C"**. A copy of the order of the trial court denying petitioner's motion to amend or alter judgment, dated November 2, 1983, is found at **APPENDIX "D"**. The memorandum and order of the trial court

granting respondent City of Hutchinson's motion for judgment notwithstanding the verdict, and setting aside the jury's verdict in favor of petitioner, dated October 19, 1983, is found at **APPENDIX "E"**. The special verdict of the jury, dated September 2, 1983, is found at **APPENDIX "F"**.

The jurisdiction of this Honorable Court is invoked under the provisions of 28 U.S.C. Section 1254(1). And, review is sought pursuant to Rule 17(a) of the Rules of the Supreme Court. The en banc decision of the Tenth Circuit, with two of its members dissenting, coupled with the 3-judge panel decision, reflects a conflict within the Tenth Circuit, requiring resolution by this Court. And, the majority decision is in conflict with this Court's decisions in Rankin v. McPherson, 107 S.Ct. 2891 (1987); Connick v. Myers, 461 U.S. 138, 142 (1983); and, Pickering v. Board of Education, 391 U.S. 563 (1968).

STATEMENT OF THE CASE

Petitioner Thomas G. Koch (hereinafter "Koch") went to work for the fire department of the City of Hutchinson, Kansas, when he was 21 years old, and worked there for 19 years. He became Fire Marshal in 1976. This action arose as a result of Koch's demotion from the position of Fire Marshal.

On May 11, 1979, Koch investigated a fire in which a two-year-old child burned to death. Koch submitted a report concluding aggravated arson was the cause of the fire. This conclusion was widely discussed and debated within the fire department, and between the Fire Chief (Jones), the County Attorney (O'Sullivan), and the press and public. O'Sullivan did not agree with Koch's finding. When Koch would not change that finding, O'Sullivan brought in the KBI to investigate the fire, and later Koch; brought in a Hutchinson

Police Detective (Snell) to investigate Koch; solicited reports from Koch's two subordinates (fire inspectors Boesch and Hill) saying the fire was accidental; became hostile toward Koch; and ultimately wrote a letter to Jones, Koch's boss, accusing Koch of withholding evidence and being uncooperative, and indicating he would not work with Koch in future cases. As a result, Koch was demoted from Fire Marshal to fire inspector.

On May 11, 1979, as part of their official duties, Koch and two fire inspectors (Boesch and Hill) investigated the fire. Koch spent 68 hours on his investigation; his investigation included a thorough survey and exam of the house after the fire, taking photographs, directing that drawings of the interior of the house be made, and interviewing 15 witnesses.

At the outset of the investigation Koch followed a rule of investigators that you presume that the fire is accidental

until it is proven otherwise. On May 11, at the scene of the fire, Koch issued a preliminary statement to the press that there was no sign of foul play. As the investigation continued, Koch began to determine that the fire resulted from arson. The primary reason that Koch ultimately reached this conclusion was because an examination of the remains of the fire revealed four points of origin for the fire.

As Koch progressed with his investigation, he considered various alternatives for the cause of the fire. This included information given by the mother of the child that the electrical wiring in the house was poor; and, evidence indicating that the fuses were overloaded. The possibility of an accidental electrical fire was ruled out, however, because four points of origin were inconsistent with that cause. Koch also considered the possibility that the fire

resulted from a broken gas valve. Again, he ruled out this possibility because of the four points of origin.

Early in the investigation process Koch conferred with Jones about sending various items of physical evidence to a local lab (instead of an out-of-town lab which was the usual practice). Jones agreed, because the results could be obtained more quickly; and, the gentleman at the local lab was a metal expert and the evidence to be examined included copper wiring and a brass valve.

On May 22, 1979, Koch picked up the lab report and the ten items of physical evidence given to the lab for review. Upon returning to his office a few minutes later, Koch found Maudlin, a KBI investigator who had been assigned to the fire by O'Sullivan, waiting in his office. Koch told Maudlin that he had the lab report, laid the report on the table in front of Maudlin, and set the sack of

physical evidence on the floor. Maudlin asked Koch if there was anything significant in the report. Koch told Maudlin that the report described a break in the gas valve, and indicated that it was a possible source of the fire. Koch then went on to explain to Maudlin in detail his view that the fire resulted from arson--and not from the broken gas valve--because of the evidence showing four points of origin. Maudlin briefly looked through the report and declined to go through the sack of physical evidence, which included the gas valve. Maudlin did not ask for a copy of the lab report. The lab report was placed in the original official file of the fire department pertaining to this investigation.

In the meanwhile, shortly after the fire, O'Sullivan told a Hutchinson Police Detective (Toland) that the parents of the child could not be charged with endangering a child because that statute had been

stricken by the Kansas Supreme Court. O'Sullivan was wrong; the portion of the statute addressing endangering a child had not been declared unconstitutional. O'Sullivan told Toland to report to Koch that the statute was no longer valid; and, O'Sullivan told Toland to report to Koch that the other possible crimes which may come into play included homicide, voluntary manslaughter, arson or aggravated arson.

On May 15, 1979, Koch had a conversation in the morning with the three fire inspectors at the Hutchinson Fire Department (Boesch, Hill and Tipton). Boesch and Hill told Koch they believed the fire was accidental. Koch told all three of these gentlemen that it was starting to look like arson. Koch told Boesch and Hill he wanted them to continue working on the investigation, and that later in the week they would critique the fire. The critique took place a few days later. It was used to test the different views about the cause

of the fire. The two inspectors were unable to state a cause, but they believed it was accidental.

On May 18, 1979, Koch ran into O'Sullivan in the law enforcement center in Hutchinson. Koch told O'Sullivan that the case was starting to shape up as arson. O'Sullivan became irritated and chastised Koch about how hard it was to prove arson. Koch responded that he realized it was hard to prove; and, that he did not like to have to lay it in O'Sullivan's hands, but that it was his job to determine the cause of the fire and O'Sullivan's job to prosecute the offender. Koch concluded by telling O'Sullivan that his report would be forthcoming and he would go over it with him.

After this conversation with Koch, O'Sullivan went to KBI agent Maudlin and instructed Maudlin to do an investigation into the fire. O'Sullivan said he did this because he did not agree with Koch's

opinion that the fire resulted from arson. O'Sullivan based his disagreement solely on the view of Hutchinson Police Detective Toland. Toland was not a fire investigator; and, he had only spent a very short period of time at the scene of the fire (set up against the many hours that Koch had spent at the scene). Toland and Maudlin conducted their investigation by talking to Koch three times, on May 22, May 23 and May 30. On each occasion, Koch spent several hours going over the details of the evidence, explaining why he ruled out various possibilities for the fire, and his opinion that the fire was arson. A considerable amount of his discussion centered on the four points of origin, how he determined they existed, and why they pointed to arson. Toland and Maudlin did very little investigation beyond these conversations with Koch; and, they did no further investigation after May 30, 1979.

On May 24, 1979, Koch finalized his report. His finding was aggravated arson. He closed the report by stating that he had made all reports and underlying documents and evidence available to Maudlin and Toland; and, that they were available to anyone else with questions or with a desire to view them. Neither O'Sullivan, Maudlin nor Toland ever asked to see any of the file; nor did they ever do any follow up investigation or interview.

In his May 24, 1979 report, Koch specifically addressed the issue of the gas valve: "The possibility of a gas leak causing four physically separate fires is also not logical. Signs from the fire pattern indicated fire burning to the furnace rather than from it. Gas was indeed a fuel after the roof collapsed prior to being shut off by firefighters; line severed when roof fell. Not even the torch effect of the severed line could result in the widely separate damage incurred."

Throughout the trial, respondents claimed that Koch was demoted, in part, because he withheld evidence of the broken gas valve. And, O'Sullivan claimed that Koch told him that the lab report on the gas valve was negative. Koch's report, however, referred to the valve; Koch showed the lab report to Maudlin; and, Koch told O'Sullivan he had taken the valve to the lab, and that the lab had done a report; but that he did not believe the broken valve caused the fire because of the four points of origin he found. There were various other items of evidence through the trial supporting Koch's position that the lab report was referred to often, and in no way hidden or withheld. The jury, by its verdict, obviously believed Koch's version, rather than respondents'.

When Koch had his report finalized, on May 24, 1979, he hand carried it to O'Sullivan's office. He left word with O'Sullivan's secretary that he would like

to talk to him about the report. Between May 24 and May 29, 1979, Koch left several messages (by phone and in person) requesting that O'Sullivan call him. O'Sullivan never called him; O'Sullivan stated at trial that he did not agree with Koch's conclusion and that he did not want to talk to Koch about the file, his report, or his opinion. O'Sullivan intentionally ignored Koch's requests that he call him to talk about the report.

Instead of contacting Koch about the report, O'Sullivan went to Jones and asked him to order Boesch and Hill--both subordinates of Koch--to each prepare their own reports reflecting their opinion that the fire did not result from arson. Boesch and Hill did so, and provided those reports to O'Sullivan.

By May 29, 1979, Koch was quite concerned that he could not communicate with O'Sullivan about his report. He was also concerned that O'Sullivan bypassed him

to get reports from Boesch and Hill. It was very unusual to seek reports from subordinates, or from any person other than the person in the fire department with primary responsibility for the fire investigation (in this case Koch). Koch spoke to Jones about his concerns. Jones suggested that he and Koch should talk to the City Manager (Pyle) about the matter. Koch and Jones went to Pyle together. Pyle agreed that it would be good for O'Sullivan and Koch to sit down and talk. Pyle told Jones to arrange such a meeting. A meeting was set for May 30, 1979. Koch understood the meeting was to take place between him and O'Sullivan only. Instead, when Koch arrived at the meeting, Maudlin and Toland were also present. Even though Koch did not understand why Maudlin and Toland were still unclear on the reason for the arson conclusion (after his lengthy discussions with them on May 22 and May 23), Koch spent two hours going through all of the points

of the investigation again. He again discussed the gas valve, the bad electrical wiring, and why he ruled those out as the source of the fire. He again explained that the four points of origin indicated that the fire was set intentionally, and did not result from the broken gas valve or bad wiring. Koch left the meeting with the understanding from O'Sullivan that there was no more question about his arson finding; and, that the question that would be investigated next was "who did it". The meeting ended on a warm and friendly note.

From May 30 through July 11, 1979, Koch was not questioned by anyone about the case. He was not asked for any information. And, no further investigation was conducted by O'Sullivan, Maudlin or Toland.

On July 11, 1979, Jones told Koch that Hutchinson Police Detective Snell came to him asking to see the fire department's file on this case. Snell said he was

investigating Koch's report at O'Sullivan's instructions. Jones allowed him access to the file. The file had been available throughout this time period for review by O'Sullivan, Maudlin, Toland, or anyone else within these law enforcement agencies interested in seeing the back up evidence, reports, and information about Koch's investigation. Until July 11, none of these agencies, through any representative, asked to see the file, or showed any interest in reviewing the fruits of Koch's investigation.

On July 12, 1979, Koch was told to meet with Snell at the Hutchinson Law Enforcement Center. When Koch arrived, Snell said he wanted to talk about the lab report. Snell was very critical of Koch, saying that the investigation was poorly handled, and that this was the worst report he had ever seen. Both men lost their temper; both men raised their voice; Snell ordered Koch from his office. Without

Koch's knowledge, Snell tape recorded the conversation. When Koch learned that he was taped, he asked for a copy, and it was never given. It was not produced at trial.

At trial, respondents claimed that Koch was demoted, in part, because he refused to cooperate with the other law enforcement agencies; and was belligerent in his dealings with them. The record reflects, however, that O'Sullivan never sought information from Koch; indeed, he ignored Koch's requests and efforts to communicate. And the record reflects that when Koch was approached by any other agency with questions about Koch's investigation, or the fire, Koch responded by thoroughly answering all questions, in detail. Indeed, through the time period from May 18 through May 30, Maudlin had several long conversations with Koch; following those conversations, he wrote lengthy reports, setting out many of the details Koch gave him; those reports were

copied to O'Sullivan contemporaneously. After May 30, no information was sought from Koch; and, in fact, Koch was not approached by anyone about the fire or his investigation. Thus, there was no occasion for him to be uncooperative. And, the only evidence of any unpleasant exchange at all was the temper flare by Koch and Snell at the July 12 meeting, where Koch finally lost patience with the fact that instead of seeking the offender, the law enforcement agencies kept coming back and picking at his report and techniques and conclusion. Again, the jury heard both versions of each of these meetings, conversations, and incidents, from May 11 through July 23, 1979; and, the jury obviously did not believe the City's version, and obviously did believe Koch's version.

On July 13, 1979, O'Sullivan directed a letter to Jones, criticizing Koch, making allegations against Koch, and concluding that he would no longer work with Koch. On

July 16, 1979, Jones gave Koch a suspension letter and took his keys. On July 20, 1979, Jones interviewed Koch, at length. Koch explained again all he had done in the process of his investigation. Koch addressed charges that he withheld the lab report about the gas valve. Koch pointed out that he told everyone about the lab report and about the cracked gas valve; and, that he still ruled out the valve as the cause of the fire because of the four separate points of origin. Koch pointed out that rather than investigating to find out who committed the crime, O'Sullivan was causing Koch to be investigated. On July 23, 1979, Koch was demoted to fire inspector, with a pay reduction.

The press was informed of the disagreement within the department by O'Sullivan. The day after Koch's May 24 report was delivered to O'Sullivan, O'Sullivan told a reporter that Koch thought it was arson; that he was not

comfortable with the conclusion; that he had two other opinions saying it was not arson; that he was trying to work out the disagreement; and, that for the time being, the cause of fire should be published as undetermined. O'Sullivan claims that at the May 30 meeting Koch criticized him for this, saying that O'Sullivan was trying to cover up the fact that he found arson. On June 5, 1979, O'Sullivan issued a statement that the fire was accidental and he was closing the case. To this date, no one has ever been prosecuted for aggravated arson or arson due to this fire and the death of this child.

Respondents claimed through discovery and trial that Koch was not demoted because of his finding of arson. Rather, respondents claimed that Koch was emotionally involved in the case; that when he learned the parents would not be prosecuted for endangering a child, he switched his finding from accidental fire

to arson; that he withheld the evidence of the broken gas valve from O'Sullivan; that he was belligerent and uncooperative toward Maudlin (KBI), Toland and Snell (HPD) and O'Sullivan; and that he had disobeyed orders by Jones that he stay away from Boesch and Hill while they were writing their independent reports.

Respondents did not claim that Koch's speech was inherently disruptive, requiring his demotion. Instead, they claimed his speech was not the cause of his demotion, but that his actions other than his speech caused his demotion.

There were numerous fact disputes at trial. The trial lasted for nearly three weeks. The transcript contains some 2,500 pages; and, some 26 witnesses testified. The jury obviously did not believe respondents when they claimed that Koch withheld evidence, was uncooperative, disobeyed Jones, and so forth. Instead, the jury believed that Koch was demoted

because of his speech in the report, when he found that the fire resulted from aggravated arson.

After some unsuccessful state court litigation, Koch filed suit in federal court on October 29, 1979. He asserted due process and free speech claims. A pretrial conference order was filed March 9, 1982. In the pretrial order, respondents maintained that Koch was demoted due to his misconduct in withholding evidence and not cooperating; not due to his speech. Respondents did not claim that Koch's speech was disruptive and that they were entitled to judgment under the Pickering balancing.

Jury trial was commenced on August 15, 1983, and ended on September 2, 1983, on Koch's First Amendment claims. On August 25, 1983, a directed verdict was granted to the five city commissioners. On August 25, 1983 and August 31, 1983, a motion for a directed verdict by the city, on the

grounds that the speech was not protected, was overruled.

At Instruction No. 14 the jury was instructed: "The following portion of the May 24, 1979, Fire Investigation Report is speech protected under the First Amendment: 'It is my opinion this was an aggravated arson fire.'" At Instruction No. 15, the jury was instructed that to find for Koch they must find that the protected activity he engaged in was the "substantial factor" or the "motivating factor" in respondents' decision to demote him. And, if Koch demonstrated that his protected activity was the "substantial" or "motivating" factor in his demotion, the burden then shifted to the City to demonstrate by a preponderance of the evidence that the same decision would have been made even in the absence of the protected activity Koch engaged in. "Ultimately, to find for the plaintiff against any of the defendants you must find that his protected activity,

freedom of speech, to wit: 'It is my opinion this was an aggravated arson fire.' was the substantial or motivating factor of his demotion."

On September 2, 1983, the jury returned a special verdict accompanied by special interrogatories. The jury found defendants Pyle and Jones not liable. The jury found the City of Hutchinson liable for abridging Koch's First Amendment rights to freedom of speech. The jury found that Koch proved that the protected portion of his May 24, 1979, report was the substantial or motivating factor for his demotion.

On September 12, 1983, respondent City filed a motion for judgment notwithstanding the verdict. The trial court granted the motion and entered judgment in favor of the City. The trial court found that Koch's speech was not protected because it was made in the course of an official report which was part of his official duties. The

trial court relied primarily on a Tenth Circuit case, Schmidt v. Fremont County School District, 558 F.2d 982 (10th Cir. 1977). The trial court said that Koch was not commenting as a citizen upon a matter of public concern, but rather as an employee issuing an internal report in the course of his official duties. After a motion for reconsideration was denied, Koch appealed.

On March 27, 1987, a 3-judge Panel of the Tenth Circuit rendered an opinion. (One member was a Colorado federal district judge sitting by designation.) The opinion was split, 2-1. The majority reversed the trial court on the protected speech issue. See Koch v. City of Hutchinson, 814 F.2d 1489, 1497-1499 (10th Cir. 1987). The majority held that this case was not like Connick where the employee was complaining about her own personnel situation. Rather, the majority reasoned, this case is more like Pickering, where an employee commented

on matters about his employer, but not pertaining to his own personal personnel situation, that were, by their nature, matters of public concern. The majority noted that unlike Connick, the speech here was of public import in evaluating the performance of the City's elected officials. And, unlike Connick, the speech here was not motivated by personal interest. "Koch's objective was to inform his superiors of what he believed to be arson and then the public of what he believed was defendants' misfeasance." Koch, supra, 814 F.2d at 1498.

The dissenting opinion relied upon the Schmidt case, concluding that the report was part of Koch's duties, and, therefore, not a matter of public concern. See Koch, supra, 814 F.2d at 1499-1501. The dissent reasoned that Koch's speech was part of his duties as an employee of the City. "The record does not in any way indicate that plaintiff intended the report to be

anything other than the ordinary exercise of his routine duties within the fire department although the matter was serious." Koch, supra, 814 F.2d at 1499.

On April 29, 1987, on the petition of the City, rehearing en banc was granted. On June 2, 1988, an opinion was rendered on rehearing en banc. The majority reversed the 3-judge panel; the opinion included two members of the Court dissenting.

The majority held that it was entitled to review the question of whether the speech was protected, and the question of the Pickering balancing test, de novo. The majority re-weighed the facts, and set out its own facts, upon which its decision was based. The facts recited by the majority are the opposite of what the jury found.

The majority also held that it would not establish a per se rule that any speech made in an official report was unprotected as a matter of law. "Nonetheless, it is a significant factor which may frequently

lead to a finding that speech is unprotected, because, as we discuss more fully infra when we conduct the Pickering balancing in this case, speech in the course of an employee's duties will usually, if not always, reflect upon the employee's competence to perform his or her job. "Appendix"A", pp.15-16. Emphasis theirs.

The majority also held that the speech was not protected as a matter of law. The majority reached back into the discovery record, found a sliver of Koch's testimony, and concluded from that that Koch's motive was to find improprieties by City officials to reveal in a lawsuit. And, the majority held that the fact that the speech was made in an official report was a factor weighing against finding the speech to be protected. And, the majority held that Koch's speech was not calculated to inform or alert the public about the government's discharge of its duty to investigate the fire.

The majority held that the Pickering balancing "clearly tips in favor of the employer, the City". Appendix "A", p. 34. In making this finding, the majority accepted the claims of respondents--that Koch withheld evidence and was uncooperative--as though those claims had not been rejected by a jury. Further, in making this finding, the majority found that Koch's behavior was disruptive; but, the majority did not find that Koch's speech (finding aggravated arson) was inherently disruptive. Numerous fact findings were made, as though there was no evidence to the contrary, and as though those facts were uncontroverted.

A short concurring opinion was written by Judge McKay. A dissenting opinion was written by Judge Logan, joined by Judge Seymour. The dissent notes that the majority "unjustifiedly supplants the jury's verdict with its own view of the evidence, in order to conclude under the

Pickering test that the [City's interest outweighed Koch's interests]". Appendix "A", dissenting opinion, p. 1. The dissent also notes that rehearing was limited solely to whether the speech was protected; and, it was not granted on the Pickering issue.

The dissent also notes that Koch's speech was not on a personal matter; instead, it stated that he believed a fire which claimed the life of a child had been deliberately set. And, the dissent notes that when law enforcement officials disagree about how a fire started, the public should know about this to assess the conduct of government officials. And, the dissent notes that just because Koch spoke in an official report, that does not mean his speech is "of less value to 'informed decision-making by the electorate'". Appendix "A", dissenting opinion, p. 4. The dissent notes that the majority's opinion "places government employees whose

duties require conclusions on issues of intense public concern in an untenable position". Appendix "A", dissenting opinion, p. 5. The dissent noted that this holding places pressure on public officials not to report unpopular conclusions.

The dissent also noted that since the majority concluded that the speech was not of public concern, it should have ended the inquiry, rather than proceeding with a Pickering balancing. And that the majority "provides no rationale for assigning the presumption against the employee" when the speech is made in an official report. Appendix "A", dissenting opinion, p. 7. "[A]nd as a general proposition the fact that the speech is contained in an official report should weigh in favor of the employee under Pickering." Id. The interest of the employer should be in promoting truthful and accurate reports; not in placing a fire marshal in a position of being demoted simply because he reaches

an unpopular conclusion. And, that the majority ignores the governmental interests in protecting speech in official reports and "looks only at the 'disruptive' aspects of Koch's statement". Appendix "A", dissenting opinion, p. 8. And that the test under Pickering requires the court to determine whether the particular speech is inherently disruptive in the work place. Finally, that the court "must be careful not to go too far and determine issues that are properly for the factfinder". Appendix "A", dissenting opinion, p. 9. "If the evidence were as one-sided as the majority states it, then the majority's Pickering analysis might be correct. But this is not an open and shut case. Rather, the majority overlooks those parts of the record that support the jury's verdict." Appendix "A", dissenting opinion, p. 10.

REASONS FOR ALLOWANCE OF THE WRIT

Petitioner requests that the writ issue pursuant to Rule 17.1(b) and (c); generally, because the majority's opinion is in conflict with other opinions within the Tenth Circuit; and, the majority's opinion is in conflict with the opinions of this Court.

Reasons the writ should be allowed are contained in large part in the dissenting opinion. The entirety of that opinion is incorporated into Petitioner's arguments here. Additional reasons are set forth below.

I. The Majority Improperly Construed Its Duty, To Make An Independent Examination Of The Whole Record To Determine If The Speech Was Protected As A Matter Of Law, As A Duty Or Right To Retry "Historical" Facts And To Usurp The Jury's Decision On The Fact Issues Properly Presented To It.

The majority correctly notes that this Court has directed that in a First Amendment government employee case "an appellate court has an obligation ... to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression'", citing Rankin, supra, 107 S.Ct. at 2897 n. 9. And the majority notes that this question is one of law.

Petitioner submits that in fulfilling its duty to examine the whole record to be sure that the speech was protected, the majority went too far in re-weighing the facts. As the dissent notes, at pp. 9-13 of its opinion, there are numerous underlying fact disputes which were presented to a jury for determination. And, the dissent notes that in reaching its conclusions, the majority opinion ignored these jury findings, and substituted its own findings for those of the jury. Even

though this is ultimately a legal question, to be reviewed de novo by the appellate court, petitioner submits that there are numerous fact issues intertwined, and it is improper to ignore fact determinations by the jury on those issues in conducting that review. In other words, the facts, on appeal, should be viewed in the light most favorable to the petitioner, when this review is made.

This issue is somewhat confused in the record, because as will be discussed under Issue II below, the majority glides back and forth between a statement of the Pickering balancing, on the one hand, and what was actually respondents' proffered legitimate basis for the demotion, on the other hand. The majority confused these two concepts which only heighten its error in weighing the facts. In other words, not only did the majority retry the facts; but the majority also undertook the wrong fact inquiry under Pickering. The question it

should have addressed is whether Koch's speech was inherently disruptive. The question it improperly addressed was whether Koch's conduct--**other than his speech**--was improper (in this case allegedly disruptive), and warranted the demotion.

The Tenth Circuit has addressed the proper manner in which it should carry out its duty of independent constitutional review, in the context of a motion for directed verdict, in a first amendment government employee case. In Saye v. St. Vrain Valley School Dist. RE-1J, 785 F.2d 862, 865 (10th Cir. 1986), the court noted that in Connick this Court pointed out that the inquiry into the protected status of speech is one of law, not fact, and that a district court's views on this issue are therefore not subject to the clearly erroneous standard of review. And, that an appellate court must make an independent constitutional judgment on whether, under

the particular circumstances, the statements at issue are constitutionally protected. The court then stated: **"However, the underlying historical facts upon which the constitutional claim is grounded are subject to the traditional standards of review governing the treatment of historical facts in any other case."** Id.

And certainly it must be this way. Otherwise, what is the point of having a jury? And, how are the typical kinds of fact disputes that accompany these legal questions going to be resolved?

The majority opinion recites a version of the facts that simply was not agreed to by the jury. In the appellate context, the jury's verdict should have some meaning. And, the appropriate approach is that described by the Tenth Circuit in Saye; that is, the "historical facts" (or the history of factual events) should be reviewed in the traditional manner, in the best light for the plaintiff.

Rather than doing this, the majority found its own facts, in some instances by reaching back into the discovery record (rather than the trial record). For example, at p. 28 the majority states that in his deposition Koch revealed that he compiled a list of alleged improprieties on the part of city officials which he hoped to reveal in his litigation. This statement is made to support a holding by the majority that Koch was not acting with a motive to inform the public.

A review of Koch's deposition testimony, however, reveals that he was being questioned about a news article in 1980--a year after the events at issue in the case. And at that point he was embroiled in state court litigation and disputing with the City. In that context, indicated he had information about misconduct by city officials which did not pertain to the fire at issue or to his employment. This sliver of testimony from

his deposition had nothing to do with his motive in finding aggravated arson or in trying to have the arsonist identified and prosecuted. And, even if he was compiling a list of misconduct by city officials, those matters themselves would be matters of public concern. They had nothing to do with some personal personnel dispute between Koch and the City. They had, rather, to do with the performance of duties by elected officials and their appointees.

The trial record indicates that Koch testified that from at least May 18 through July 23 he was trying to get O'Sullivan, Maudlin and Toland (with the help of Jones and Pyle) to find and prosecute the arsonist. And, he was trying to explain to their satisfaction his aggravated arson finding. There is no evidence at all that he was trying to compile a list of misdeeds to use in some personal dispute with the City or County. And, even by respondents'

version of the facts, from May 18 through July 23, Koch was trying to have someone prosecuted for arson because he was emotionally involved in the case and felt something ought to be done. The only conclusion that can be drawn is that Koch's motive was to inspire government officials to do their duties; and, Koch's motive was to let everyone know that the fire was caused by arson and that something should be done about it. These facts are all ignored by the majority, as though they did not exist. How can a fair review--whether it is called "independent", "constitutional", "de novo", or otherwise--be conducted by a court that completely ignores whole bodies of evidence, and completely ignores one party's side of the case?

This is but one example of the majority's improper retrying of the facts, to reach an improper or unsound conclusion. The majority's position that it can retry

all underlying facts is inconsistent with other cases within the Tenth Circuit, including Saye. It is an issue which should be resolved by this Court. This Court should state whether it intends, when instructing lower courts to review the record and make an independent constitutional judgment about whether the speech is protected, it intends for appellate courts to ignore facts that favor the plaintiff's side, fully adopt the defendants' version of the facts, and ignore jury findings on the facts. It is contrary to our system of jurisprudence to take broad categories of garden variety fact disputes and remove them from the jury.

II. The Majority Improperly Conducted The Pickering Balance In This Case Because: (A) That Issue Was Never Raised And Such Balancing Was Never Requested By Respondents Before The Trial Court Until After The Jury's Verdict; (B) The Pickering Balancing Should Not Have Been Conducted In The Absence Of A Concession By

Respondents That Petitioner's Speech Was The Substantial Or Motivating Factor In His Demotion; (C) By Balancing In Favor Of Respondents Because: (i) In Doing So The Court Retried The "Historic Facts"; (ii) In Doing So The Court Placed Undue Significance On The Fact That Petitioner's Speech Was Done In The Context Of An Official Report; And, (iii) In Doing So The Court Found That Conduct Other Than Petitioner's Speech Was Disruptive And Justified Respondents Demoting Petitioner, Whereas Pickering Requires That The Speech Itself Be Inherently Disruptive Before The Employer Can Restrict The Speech.

The majority, at n. 14, p. 13, held that it was proper for the court to conduct the Pickering balancing even though it was not raised by respondents until after the jury verdict; even though the trial court's directed verdict was not on that issue and the City did not cross-appeal; and, even though in granting rehearing en banc, the court only stated it was rehearing the protected speech issue.

While petitioner recognizes that--like the protected speech issue--the Pickering

balancing can be reviewed anew by an appellate court, petitioner submits that it must be properly and timely raised before any review should be done. All through the trial, and indeed all through the appeal, the City has contended that Koch was not demoted because of his speech. Rather, and pursuant to the Mt. Healthy framework, the City has contended that Koch was demoted for other misconduct. After that position failed with a jury, the City pretended to change positions. Then the City began talking about Pickering and its right to have a balancing under that case. It is improper for the majority to let respondents switch horses in the middle of the stream this way.

Worse yet, the nature of the City's position still does not entitle them to a Pickering balancing. As the dissent notes, only when the speech is alleged to be inherently disruptive does Pickering kick in. And, a fortiori, before a defendant

can claim that it had to demote an employee because his speech was too disruptive, that defendant must concede that the employee was demoted because of the speech. The City has never made that concession; therefore, the City is not entitled to the Pickering balancing. Instead, the City has claimed that Koch's speech--that the fire was aggravated arson--had nothing to do with Koch's demotion. That, instead, they had a legitimate reason for his demotion, i.e., his uncooperativeness, his withholding or concealing of evidence, his belligerence, and so forth. It is very typical in any kind of an employment/discrimination case for the employer to claim a legitimate reason for the adverse employment action. That alleged legitimate reason was rejected by the jury, and that should be the end of the so-called "disruptive" claim by the City.

In finding that the balancing tipped against Koch, the majority relied heavily

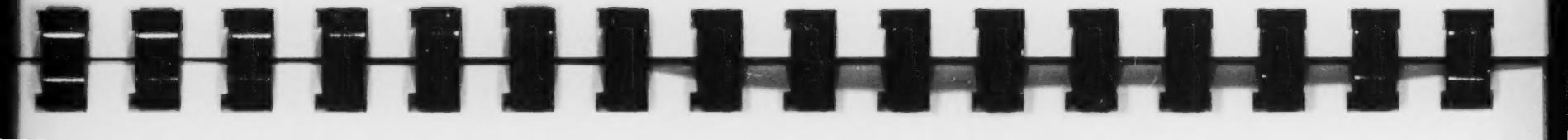
upon the fact that the speech was included in an official report. Discussion of the impropriety of this ruling is found at Issue III below. The majority also tipped the balance against Koch by retrying the facts. The impropriety of that ruling is discussed at Issue I above. The majority also tipped the balance against Koch by finding that his actions were disruptive. As discussed earlier, in doing so, the majority adopted in general terms the version of the facts offered by the City, that is, that Koch lied about the gas valve report, hid the gas valve report, refused to cooperate with representatives of other law enforcement agencies, disobeyed direct orders from Jones, and so forth.

In Pickering this Court held that if speech was inherently disruptive, the employee was not entitled to protection from retaliation for that speech. In Pickering the employer was claiming that the employee's speech--criticizing the

Board's allocation of school funds between education and athletic programs--was itself disruptive. The school board was contending that Pickering was not honest in his statements, and was not responsible in presenting his statements to the public. This Court found that his relationship with the board was not so close that he owed them personal loyalty and confidence. And, more importantly, this Court found that the statements were not the kinds of statements that normally, and inherently, would disrupt the work place. For example, the Court noted that Pickering's accusations could not "be regarded as per se detrimental to the district's schools" but instead "reflect[ed] a difference of opinion between Pickering and the Board" on the issues; and, that certain statements by Pickering, even if false, "would not normally have any necessary impact on the actual operation of the schools, beyond its tendency to anger the Board". Pickering, supra, 391 U.S. at 570.

Applying that reasoning here, there is nothing about a finding of aggravated arson that would per se disrupt the functioning of the fire department, police department, or County Attorney's office in Hutchinson. Nor is there anything about that finding that would per se disrupt Koch's working relationship with those agencies or his subordinates or superiors. It just happened in this instance that it made O'Sullivan mad, because he did not agree with the finding, and did not want to find or prosecute an arsonist. Just like in Rankin, when the employer did not like the content of the employee's statements. There was nothing, as this Court found, inherently disruptive about what she said in her job circumstances.

Rather than properly balancing Pickering considerations, the majority confused the balancing process there (which addresses the concept of disruption), with the claimed legitimate basis for Koch's



demotion, part of the Mt. Healthy process (which happened to include the concept of disruption). The majority glided from one concept to the other, and confused the matter terribly. In the absence of a finding that the speech itself was inherently disruptive, it was error for the majority to conclude that the balancing should tip against Koch.

III. The Majority In Fact Improperly Made A Per Se Rule That Speech Made As Part Of Official Duties Or Included In Official Reports Is Not Protected; Or, If This Court Agrees That No Such Per Se Rule Was In Fact Established, The Majority Erred In Placing Undue Significance On That Factor And Balancing That Factor Against Petitioner; Or In Making A Rule That That Factor Should Always Be Balanced Against The Employee.

In Pickering v. Board of Education, 391 U.S. 563 (1968), Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977), and Connick v. Myers, 461 U.S. 138 (1983), this Court established two exceptions to

the rule that speech of a public employee is afforded first amendment protection. The speech is not constitutionally protected (1) unless it relates to a matter of public concern or (2) unless the speaker's right outweighs the state's right to control its employees. See, e.g., Wren v. Spurlock, 798 F.2d 1313, 1317 (10th Cir. 1986).

The majority has improperly added a third exception. The majority has held, as a practical matter, that if the speech is included in an official report, it is not protected. The majority had no authority to add this exception; and, this third exception is contrary to well established law of this Court.

The majority says that it is not establishing a per se rule, or third exception. But, the majority goes on to say that significant weight should be given to this factor; and, indeed, in tipping the balance under Pickering against Koch, the

majority relies primarily on the fact that the speech was included in an official report. In other words, in this case, per se, because the speech was in an official report, Koch lost.

Even if a clear third exception has not been improperly created by the majority in the Tenth Circuit, the majority unreasonably placed undue and negative significance on this factor. As the dissent asks, why would the presumption be against the employee when the speech is in an official report? And, why does the fact that the speech appears in an official report render it less important to the public's assessment of the performance of duties by government officials? And, why would the government have less interest in protecting speakers in official reports, than out? As one of the dissenters questioned at rehearing en banc, if Koch had made the exact same statement in a letter to the editor of the Hutchinson

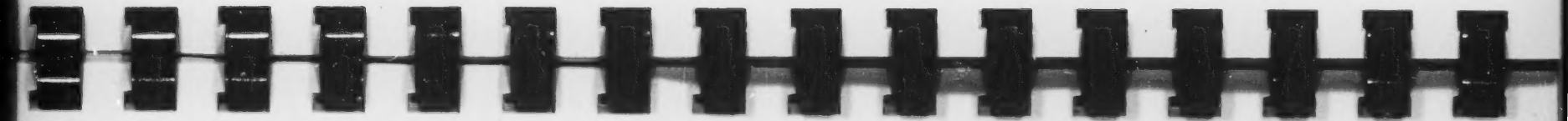
newspaper, would protecting it there--but not in the official report--be logical? There is simply no rhyme or reason to treating the statement differently when it is in an official report.

On rehearing en banc, counsel for amicus argued that since there are thousands of government reports written daily, if the Court did not rule that speech in official reports was unprotected, the floodgates would open and litigation would increase in this area. However, this is not true; because, Koch was not asking for a per se rule that speech in official reports was automatically protected. Any speech--whether in official reports or otherwise--must pass the non-disruptive and public concern threshold. Of these thousands of reports written, a very finite number will be of public concern like the report here was. With due respect, there are already enough barriers to lawsuits for injured plaintiffs; there is no need for

the majority to go out of its way to create another.

If the speech is disruptive--whether it is in an official report or not--government employers already have protection from that disruption, under this Court's rulings, in at least two ways. First, they can claim--and prove--that the speech was inherently disruptive. If so, they are protected, with or without the package of an official report. Second, they can claim--and prove (as the City attempted and failed to do)--that the actions of the employee other than the speech (whether surrounding the speech, at the same time as the speech, or totally disconnected from the speech), was disruptive, and therefore improper, and therefore properly punishable. Why does the majority feel compelled to create a third exception, and give the government employer an additional reason for protection?

As the dissent notes, there is no sound rationale for treating this factor as a negative factor. If anything, the opposite should be true. This Court should find that speech in an official report is entitled to more protection, not less. It is important for the proper functioning of the government that persons with the responsibility of making official reports--with the obvious purpose of having an accurate record of events within government business--be free to speak truthfully in those reports, whether it makes someone angry or not. And they should feel free to do so, without fear of retaliation which will go unpunished. As one of the dissenters pointed out at rehearing en banc, suppose a famous person died of AIDS; and his superior (at the urging of the family of the deceased), told the coroner that if he stated in the death certificate that the cause of death was AIDS he would be fired. Why should this person not be



protected? Isn't the fact that this person died of AIDS of public concern in this day and age? These kinds of questions illustrate the irrationality of the majority's holding.

The majority has created a category of speech which will be unprotected, without a sound basis for doing so, and contrary to the rulings of this Court.

IV. The Majority Erred In Finding That Petitioner's Speech -- Made In An Official Report And Constituting A Finding That A Fire Which Resulted In The Death Of An Unattended Small Child Was The Result Of Arson -- Was Not A Matter Of Public Concern, And Therefore Not Protected As A Matter Of Law.

Aside from the specific points of error addressed above, petitioner submits that the majority's holding, that this speech was not protected, is wrong. This is not a case like Connick, where Koch was involved in some personal fight with his employer, and was using his duty to write a

report about the fire to help in that dispute. All of the evidence illustrates that Koch's relationship with his employer was smooth; and that his relationship with the other law enforcement agencies was good. He had been in the job for over 3 years, and with the department for 19 years. The fact that the following year, when he was in litigation with the City, some news article said that Koch popped off his mouth in the heat of anger about other things these officials had done wrong, has nothing to do with the context of Koch's speech in 1979.

The record illustrates that the "content, form and context" of Koch's speech was the first aggravated arson case in Hutchinson; the death of a 2-year-old child; press attention on the case <u>not</u> initiated by Koch; a strong split of views within the ranks of the officials with experience and knowledge to speak to the cause of the fire; and efforts by Koch to

have the aggravated arson, and death of a small child, investigated. It should be obvious that the opinion of the local fire marshal, after investigating the fire, of the cause of the death of a 2-year-old child, would be a question of public interest. And, it should be obvious that the manner in which other law enforcement agencies react to that finding, is a matter of a public concern. It is certainly relevant to the public's assessment of how elected officials do their job to see how they handle a finding of aggravated arson. Here, they handled it wrong. Rather than seeking the perpetrator, they turned on Koch, and punished him for his finding. There is no evidence that he made his finding with some ulterior motive. There is no evidence that he did anything after he reached that conclusion but try to get other law enforcement agencies to find the arsonist, and try to get the County Attorney to prosecute the arsonist. This

is a classic example of speech which is of public concern. The "content, form and context" of the statement illustrates that this entire matter was of public interest. Whether or not the public actually knew of Koch's report, or actually knew of the inner-disputing about the cause of the fire, the fact is that this speech, if known to the public, would sufficiently inform them on the question of how elected officials were doing their duties. Koch conducted himself properly. And, he was punished because he would not change his report. The majority erred in finding that this speech was not a matter of public concern.

CONCLUSION

Petitioner submits that the majority made several serious mistakes in its analysis and holding. First, the majority improperly retried the historical facts,

rendering the jury's verdict, after a 3-week trial, meaningless. Second, the majority improperly balanced under Pickering by allowing the City to raise the issue untimely, and by treating the claimed legitimate basis for demotion as the kind of disruption necessary under Pickering. The majority did not find that the speech of Koch was disruptive, or inherently disruptive. Therefore, the majority should not have tipped the balance against Koch. Third, the majority improperly established a third exception to first amendment protection to the speech of government employees. The majority found that if speech was included in an official report it would, per se, be unprotected. Although the majority claims not to have made this finding, the majority in fact did so because of the weight placed on that factor. And, even if the majority did not create a third exception, it placed undue and negative significance on this factor.

Fourth, the majority improperly concluded that the speech here--that the fire at issue resulted from aggravated arson--was not a matter of public concern, and not protected as a matter of law. For these reasons, the writ should issue, the majority opinion should be examined, and reversed.

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the above and foregoing **PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT** have been served upon the following counsel of record by placing same in the United States Mail, properly addressed and postage prepaid, on the 26th day of August, 1988: Mr. Robert L. Howard, Esq., 700 Fourth Financial Center, Wichita, Kansas 67202; Mr. Philip H. Alexander, Esq., Post Office Box 1567, 125 E. Ave. B, Hutchinson, Kansas 67501; and, Mr. James M. Kaup, Esq.,

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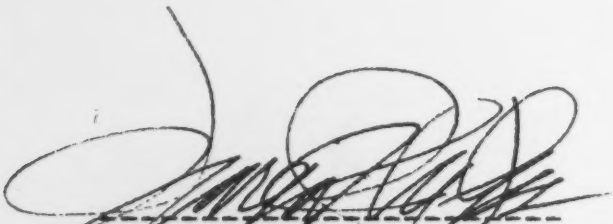

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88-368 (2)

Supreme Court, U.S.
FILED
AUG 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

DOCKET NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

THOMAS G. KOCH,
Petitioner,
Versus
CITY OF HUTCHINSON, KANSAS, ET AL.,
Respondents.

APPENDICES TO:
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

THOMAS G. KOCH, Plaintiff-Appellant,	)	
vs.	)	Case No. 83-2561
CITY OF HUTCHINSON, et al., Defendants-Appellees.	)	

ON REHEARING EN BANC

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. No. 79-1583)

Margie J. Phelps (Fred W. Phelps, Jr., with her on the briefs), Phelps-Chartered, Topeka, Kansas, for Plaintiff-Appellant.

Robert L. Howard, Foulston, Siefkin, Powers & Eberhardt, Wichita, Kansas (Timothy B. Mustaine, Foulston, Siefkin, Powers & Eberhardt, Wichita, Kansas, and Philip H. Alexander, City Attorney, Hutchinson, Kansas, with him on the briefs), for Defendants-Appellees.

James M. Kaup, General Counsel, League of

Kansas Municipalities, Topeka, Kansas, Amicus Curiae.

Before HOLLOWAY, Chief Judge, MCKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, and BALDOCK, Circuit Judges.

ANDERSON, Circuit Judge.

Plaintiff/appellant Thomas Koch was demoted from Fire Marshal for the City of Hutchinson (the "City") in part because of a written report he prepared in the course of his official duties in which he stated his professional opinion as to the cause of a fire. He contends that the report was protected speech under the First Amendment and could not therefore be the basis for his demotion. After a jury verdict in Koch's favor, the United States District Court for the District of Kansas granted the City's motion for judgment notwithstanding the verdict, set aside the jury's verdict and entered judgment for the City. A panel of this court reversed the district court's judgment. We granted rehearing en banc and, after further consideration, we affirm the

district court's judgment for the City.

BACKGROUND

Koch served as Fire Marshal for the City from November 1976 until he was demoted to Fire Prevention Inspector on July 23, 1979. Koch worked under the supervision of the Fire Chief of the Hutchinson Fire Department, defendant Dallas Jones. His duties as Fire Marshal included the investigation of all fires within the City and the supervision of subordinate fire inspectors.[1]

On May 11, 1979, in pursuit of their official duties, Koch and two subordinate

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[1] In addition to the City and Jones, the remaining defendants were Joan Schrag, Bill Bornholdt, Ralph Gingerich, John Corey, Dan Robinson and George Pyle. Schrag was the mayor, Pyle was the City Manager, and the others were City Commissioners of Hutchinson at the time of Koch's demotion.

fire inspectors investigated a house fire in which an unattended small child died. In the course of his investigation, Koch sent various items to General Laboratories, an independent laboratory, for analysis. In its report to Koch dated May 22, 1979, the laboratory concluded that a cracked gas valve was a possible source of the fire. Although he had earlier expressed the view that the fire was accidental, Koch stated in his May 24 official report to Reno County Attorney Joseph O'Sullivan that the fire "was an aggravated arson fire." The report did not mention the analysis of the cracked gas valve by General Laboratories.[2]

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[2] There was testimony suggesting that other pieces of information should have been included in Koch's report. R. Vol. XV at 1477-78; R. Vol. XVII at 1799-1800. On cross-examination, the City elicited from Koch that certain other "details" of which Koch was aware (the fact that an electrical

O'Sullivan, whose responsibility it was to determine if criminal prosecution was warranted in connection with a fire, questioned Koch's May 24 report and conclusions and, the day after he received it, asked the other two fire investigators to submit written statements on the cause of the fire.[3] Both investigators reported

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inspector determined that the house had oversized fuses and poor wiring and the fact that Koch's two subordinate fire inspectors believed the fire to be of accidental origin) were omitted from the report. R. Vol. XV at 1425-30.

[3] O'Sullivan testified he was suspicious about Koch's report because Koch's views in the report differed from those of the other inspectors and because O'Sullivan felt "that Mr. Koch had changed his mind regarding the cause of the fire after he found out the parents [of the dead child] couldn't be charged with endangering a child." R. Vol. XVI at 1573. The subordinate inspectors testified, and had earlier reported to a police detective who investigated Koch, that they viewed Koch's change in view in the same way. R. Vol. XIV at 927-28, 1030-35; R. Vol. XIX, Pl.'s Ex.

the fire as accidental. O'Sullivan also had asked a Kansas Bureau of Investigation ("K.B.I.") agent to investigate and report on the fire. The K.B.I. agent also determined that there was no basis for concluding that the fire resulted from arson. The agent testified that Koch "did not like us questioning his abilities" in the investigation and provided little information on his conclusion that arson caused the fire. R. Supp. Vol. XVIII at 66-67.

On May 25, in response to a request from a Hutchinson newspaper reporter, O'Sullivan released to the press the contents of Koch's report and the reports of the other investigators. On May 30,

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52 at 80.

O'Sullivan, the K.B.I. agent, Koch, Fire Chief Jones, and a police detective met to discuss the situation. Although Koch testified at trial that he felt he cooperated with other officials and answered their questions, Jones, O'Sullivan and the K.B.I. agent testified that Koch was uncooperative and that Koch and O'Sullivan argued. O'Sullivan testified that, in discussing the laboratory analysis omitted from his report, Koch told him that the laboratory results were "negative" and that nothing in the laboratory report contradicted Koch's conclusion. R. Vol. XVI at 1577. Soon thereafter, a local newspaper story chronicled the dispute as to the origin of the fire.

Sometime after June 5, after learning of the actual contents of the laboratory

analysis, O'Sullivan requested a police investigation of Koch because he believed Koch's omission of that analysis from his report amounted to official misconduct. The investigating detective reported that Koch became "upset" and "irrate" [sic] during the investigation, and that he "told me that he did not have to explain or defend his report to anyone." R. Vol. XIX, Pl.'s Ex. 52 at 81.[4] After receiving the police report, O'Sullivan wrote Jones on July 13, stating that:

> The net result is a total lack of confidence in his [Koch's] opinion and in his ability to rationally and professionally conduct an investigation. This lack of confidence is not only on my part

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[4] The detective's testimony was that Koch got "quite irritated" and "agitated" and "told me that he didn't have to explain his report to me or any other policeman, and we had a few words and he left the office." R. Vol. XVI at 1781.

> but is shared with me by the police detectives and the local K.B.I. agent. On the other hand and to the contrary we have total confidence in the other arson investigators in your department, and that not only are they pleasant and cooperative to work with but their conclusions appear based in fact and reason. On behalf of the Reno County Attorney's Office and as long as I hold this position, I will not accept a report from Chief Fire Marshall [sic] Thomas Koch as the basis of a criminal charge nor do I feel that I could ever call him as a State's witness and sponsor him as credible and reliable.

R. Supp. Vol. XIX, Pl.'s Ex. 10.

After receiving O'Sullivan's letter, Jones met with City Manager Pyle to discuss the situation and they determined to put Koch on paid leave of absence until the matter could be investigated. Jones conducted an investigation, during which he met with Koch and heard Koch's view of the situation. After completing the

investigation, Jones and Pyle decided to demote Koch and he was so notified on July 23 in a letter in which Jones stated that Koch had been "uncooperative and belligerent with representatives of other investigating agencies," had not disclosed information "very important and relevant to the investigation," had by his behavior and refusal to cooperate with other investigators "destroyed necessary working relationships with these agencies," and had failed to cooperate with O'Sullivan. R. Vol. XIX Pl.'s Ex. 2. After Koch's demotion and suspension, local newspaper stories described the entire situation.

Koch subsequently filed this action in the United States District Court for the District of Kansas, alleging that his demotion violated his First, Fifth, Ninth,

and Fourteenth Amendment rights and 42 U.S.C. {{ 1983, 1985, 1986 and 1988. The district court disposed of all claims against the City Commissioners, the procedural due process claims, and the conspiracy claims in various pretrial rulings and in a partial directed verdict.[5] The district court denied defendants' motion for a directed verdict on the First Amendment claim and instructed the jury that

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[5] Koch had earlier filed a state court mandamus action, which resulted in findings against him on all counts, including a due process claim. Koch v. Martindell, No. 79 C 403 (Kan. Dist. Ct. Aug. 28, 1980). The Kansas Court of Appeals affirmed in a per curiam opinion, Koch v. Martindell, No. 80-52,577-A (Kan. Ct. App. Nov. 5, 1981) and Koch did not appeal that decision to the Kansas Supreme Court. Accordingly, the district court granted defendants' motion for partial summary judgment on the procedural due process claims on the basis of collateral estoppel. R. Vol. I at 120-23.

Koch's conclusion in his report that the fire was caused by aggravated arson was protected speech as a matter of law, so the City was prohibited from demoting Koch on the basis of that written conclusion. By special verdict the jury found the City liable on Koch's First Amendment claim and assessed damages of $100,000. It found defendants Pyle and Jones not liable and found that the actions of Pyle and Jones in demoting Koch were "reasonable and in good faith under all of the circumstances then existing."

The City thereafter moved for judgment n.o.v., arguing that, as a matter of law, Koch's speech was unprotected under the First Amendment because it was not on a matter of "public concern" within the meaning of Connick v. Myers, 461 U.S. 138

(1983), because it failed the balancing test of Pickering v. Board of Education, 391 U.S. 563 (1968), and because there was insufficient evidence that Koch's speech, if protected, was the substantial or motivating factor in his demotion. The district court granted the City's motion for judgment n.o.v., holding that Koch's speech was unprotected because it was an "intragovernmental communication within the scope of plaintiff's official duties" and because it did not address matters of public concern.

A divided panel of this court reversed the judgment n.o.v. and reinstated the jury's verdict, holding that the speech at issue in this case was constitutionally protected. It affirmed the district court's other rulings. We granted rehearing en banc

on the issue of whether Koch's speech was constitutionally protected.[6]

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[6] The previous panel opinion disposed of Koch's five other grounds for challenging the district court's judgment. See Koch v. City of Hutchinson, 814 F.2d 1489 (10th Cir. 1987). We do not disturb the panel decision on those issues. We address only the question of whether Koch's written report was protected speech under the First and Fourteenth Amendments such that it was impermissible for the City to demote Koch on the basis of that speech.

We note that a recent Supreme Court decision, St. Louis v. Praprotnik, 108 S. Ct. 915, (1988), has, in a plurality opinion, addressed the circumstances in which a municipality will be liable for section 1983 violations predicated upon an employment decision. The City in this case initially asserted as a defense that its decision to demote Koch was "not based upon or in furtherance of any established municipal policy," R. Vol. I at 10-11, but it makes no argument on that issue before this court. In granting the City's motion for judgment n.o.v., the district court stated:

> The court has not been asked to decide, nor does it decide, for the purposes of defendant's motion, whether the acts of the individual defendants constituted

For the reasons set forth below, we hold that Koch's speech was unprotected under the First Amendment and we therefore affirm the district court's entry of judgment for the City.

DISCUSSION

Relying on Schmidt v. Fremont County School District No. 25, 558 F.2d 982 (10th Cir. 1977), the City argues that Koch's speech was unprotected under a per se rule removing constitutional protection from "public employee speech that is a normal, integral part of the employee's job." Brief of Appellee City of Hutchinson Upon

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> official policy or custom of the City of Hutchinson so as to subject the City to liability under 42 U.S.C. (1983

R. Vol. 1 at 367. In view of our disposition of this case, we need not address that question.

Rehearing En Banc at 15.[7] The City also argues that the speech at issue was not on a matter of public concern within the meaning of Connick v. Meyers (sic, Myers), 461 U.S. 138 (1983), contesting the reasons provided by the panel majority opinion for finding the speech was on a matter of public concern.[8] Finally, the City argues that, even if Koch's speech were on a matter of public concern and were not unprotected

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[7] Both the district court and Judge Seth in his dissent from the panel opinion in this case relied in part on Schmidt to find Koch's speech unprotected.

[8] The panel opinion based its conclusion that Koch's speech was on a matter of public concern on the fact that Koch's report was ultimately disclosed to the press, that Kansas law provides the public with access to Fire Marshal investigative reports, and that "Koch's objective was to inform his superiors of what he believed to be arson and then the public of what he believed was defendants' misfeasance." Koch, 814 F.2d at 1498.

under the Schmidt per se rule, the Pickering balancing test mandates that the speech be unprotected.

Koch argues that Schmidt has been implicitly overruled by Connick and can therefore no longer serve as the basis for disposition of this case. He further argues that the applicability of the Pickering balancing test is not properly before the court because the district court never relied on it in granting judgment n.o.v. to the City, and therefore, impliedly ruled in Koch's favor on that issue. He further contends that the City may not appeal that implicit decision because it failed to file a cross-appeal. Accordingly, Koch argues, the only issue in this appeal is whether Koch's speech was on a matter of public

concern.[9]

It is well settled that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." Connick v. Myers, 461 U.S. 138, 142 (1983)(citations omitted); see also Rankin v. McPherson, 107 S. Ct. 2891 (1987). Nonetheless, a state, as an employer, has compelling interests of its own. Courts must strike "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the

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[9] Koch further argues that, even if the Pickering balancing test is properly before the court, application of the test would result in a finding that his speech was protected.

public services it performs through its employees." Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

The three United States Supreme Court cases just cited establish the basic framework for analyzing a claim by a public employee that his or her governmental employer made an adverse employment decision in violation of the employee's First Amendment rights. The balancing test set out in Pickering provides the touchstone. In Rankin the Supreme Court reaffirmed its holding in Connick that the "threshold question in applying this balancing test is whether [the employee's] speech may be 'fairly characterized a constituting speech on a matter of public concern.'" Rankin, 107 S. Ct. at 2896-97 (quoting Connick, 461

U.S. at 146).[10] The public concern inquiry turns on the content, form, and context of the speech in question, as revealed by the whole record. Id. at 2897. If a statement does touch on a matter of public concern, a court must then balance the interests of the employee in making the statement against the state's interest as an employer "in promoting the efficiency of the public services it performs through its employees." Id. at 2898 (quoting Pickering, 391 U.S. at 568).[11]

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[10] Rankin also reaffirmed that even public employee speech not involving matters of public concern may, in "unusual circumstances," be protected by the First Amendment. Rankin, 107 S. Ct. at 2897 n.7. The Court has not elaborated on what such "unusual circumstances" might be and, in any event, we find no "unusual circumstances" present in this case.

[11] The complete inquiry into whether a state employer's personnel decision has improperly infringed upon an employee's

A. Standard of Review.

As a preliminary matter, we delineate the applicable standard of review for an

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First Amendment rights involves several steps. First, the employee must show that his speech was constitutionally protected (the Connick-Pickering test, a question of law); next, the employee must prove that his protected speech "was a 'motivating factor' in the detrimental employment decision. The employer 'then bears the burden of showing by a preponderance of the evidence that it would have reached the same decision . . . in the absence of the protected activity.'" Saye v. St. Vrain Valley School Dist. RE-IJ, 785 F.2d 862, 866 (10th Cir. 1986) (quoting Childers v. Independent School Dist., 676 F.2d 1338, 1341 (10th Cir. 1982)); see also American Postal Workers Union, AFL-CIO v. United States Postal Service, 830 F.2d 294, 310-11 (D.C.Cir. 1987); Wren v. Spurlock, 798 F.2d 1313, 1317 (10th Cir. 1986). cert. denied, 107 S. Ct. 1287 (1987); Brasslett v. Cota, 761 F.2d 827, 839 (1st Cir. 1985); Czurlanis v. Albanese, 721 F.2d 98, 103 (3d Cir. 1983). These latter two steps are factual questions, Wren, 798 F.2d 1317, which the jury, in this case, resolved in Koch's favor. Our disposition of this case makes it unnecessary to address the jury's verdict on the second and third steps.

appellate court in a First Amendment case.[12] The Supreme Court has made very clear that "an appellate court has an obligation [in First Amendment cases] to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" Rankin, 107 S. Ct. at 2897 n.9 (quoting Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485, 499 (1984)). The protected or

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[12] The majority of the previous panel specifically declined to address the question of whether the district court's grant of judgment n.o.v. to the City could be upheld under the balancing test enunciated in Pickering v. Board of Education, 391 U.S. 563 (1968), on the ground that the jury had resolved that balancing and the jury's resolution was not at issue on appeal. We now clarify the standard of review appropriate to both the public concern and the Pickering balancing aspects of a First Amendment claim.

unprotected nature of speech is ultimately a question of law. Id.; Connick, 461 U.S. at 148 n.7, 150 n.10; Page v. Delaune, 837 F.2d 233, 237 (4th Cir. 1988) ("In determining whether an employee's speech addresses a matter of public concern, this Court considers the speech and its context and independently reviews the record as a whole. The issue is a question of law for the court.") (citations omitted); Piver v. Pender County Bd. of Educ., 835 F.2d 1076, 1081-82 (4th Cir. 1987) ("The district court never considered or passed upon the second prong of the Pickering-Connick inquiry--the 'balancing' inquiry. We have addressed it, however, because it is a question of law and we are persuaded that the record below is sufficient to enable us to do so correctly."); Wren v. Spurlock, 798 F.2d

1313, 1318 (10th Cir. 1986), cert. denied, 107 S. Ct. 1287 (1987) ("the trial court erred in leaving that balance [under Pickering] to the jury, rather than ruling on it as a matter of law.").[13] Consistent with that clear mandate, we proceed to our own independent review of the record to

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[13] See also Brasslett v. Cota, 761 F.2d 827, 839-40 (1st Cir. 1985); Jurgensen v. Fairfax County, 745 F.2d 868, 881 n.20 (4th Cir. 1984) (court stated that it would be contrary to Connick and its own previous decision in Jones v. Dodson, 727 F.2d 1329 (4th Cir. 1984) to submit the resolution of the Pickering balancing question to the jury); Czurlanis v. Albanese, 721 F.2d 98, 105 (3d Cir. 1983) ("[I]t is the role of the court in a case alleging retaliatory action which violates the First Amendment to decide not only whether the speech at issue related to a matter of public concern, but also to conduct the necessary Pickering balancing."); Waters v. Chaffin, 684 F.2d 833, 837 n.10 (11th Cir. 1982) ("Determining whether an employee's speech or conduct is constitutionally protected is a question of law, so we are not bound by the district court's application of the Pickering test to this case.").

determine whether Koch's speech was protected.[14]

B. Existence of Per Se Rule for Speech in Course of Official

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[14] We reject Koch's argument that the Pickering balancing test is not properly before this court because the district court did not rely on that test in granting judgment n.o.v. to the City, thereby implicitly ruling in Koch's favor on that issue, and because the City failed to cross-appeal the district court's implicit decision. As indicated, application of the Pickering balancing test is a question of law, properly reviewable de novo by this court. The failure of the City to cross-appeal that point does not render it unreviewable by this court. See Blum v. Bacon, 457 U.S. 132 (1982); Mass. Mutual Life Ins. Co. v. Ludwig, 426 U.S. 479 (1976) (per curiam); Jordan v. Duff & Phelps, Inc., 815 F.2d 429 (7th Cir. 1987), cert. dismissed, 108 S. Ct. 1067 (1988); see also Scivally v. Time Ins. Co., 724 F.2d 101, 103 (10th Cir. 1983) ("trial court's decision will be affirmed if the record reveals another ground which supports the decision").

Duties.

As indicated, our task is first to determine whether Koch's speech touched upon a matter of public concern. If we find that it did, we must then conduct the balancing of employer and employee interests required by Pickering. An initial question, however, is whether Koch's speech is exempted from First Amendment protection because of a per se rule removing First Amendment protection from speech occurring in the course of an employee's official duties.

The City argues that communications made in the course of an employee's official duties are per se exempted from First Amendment protection. We hold that they are not. The City's argument relies primarily on Schmidt v. Fremont County School

District, 558 F.2d 982 (10th Cir. 1977), a previous decision of this circuit on which both the district court and the dissent to the previous panel opinion in this case relied to find Koch's speech unprotected. In Schmidt, this court affirmed a district court decision that statements by a high school principal to the board of education concerning the school's career education program and football reserved ticket sales policy were "not on issues of general public concern but statements at the school on the internal affairs of the school system." Id. at 984. This court went on to say, "[the statements] were part of his official functions. These statements do not invoke First Amendment protection." Id. at 985.

Koch argues that Schmidt has been "obviously superseded and modified by

Connick" and is "out-dated." Supplemental Brief of Appellant at 24, 26. Koch argues that no "official function" exception to First Amendment protection survives Connick; now, the only inquiry, at the threshold level, is whether the speech in question touches upon a matter of public concern. We find no reason to conclude that Schmidt has been either implicitly or explicitly overruled by Connick. Nonetheless, we do not view it as establishing a per se rule exempting statements made in the course of official duties from the protection of the First Amendment.

The Supreme Court in Givhan v. Western Consolidated School District, 439 U.S. 410 (1979) established that private expression taking place on the jobsite can be protected under the First Amendment. Nonetheless, the

Court has not specifically addressed the issue of whether speech in the course of and as a part of an employee's ordinary duties is or is not per se protected. In Wilson v. City of Littleton, 732 F.2d 765, 767 (10th Cir. 1984), this court cited Schmidt for the proposition that "[t]his circuit has applied the Pickering test to review various forms of allegedly unconstitutional discipline against public employees." We did not suggest that Schmidt had been overruled; rather the decision was viewed as yet another application of Pickering's balancing test. The Supreme Court in Connick cited Schmidt for the proposition that "if . . . [an employee's speech] cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for . . .

[the employee's] discharge." Connick, 461 U.S. at 146 & n.6. We see no evidence of either the Tenth Circuit's or the Supreme Court's dissatisfaction with Schmidt. We view Schmidt as simply holding that, in that particular case, the speech in question was unprotected under the First Amendment, and the fact that the employee statements wrere made as a part of the employee's official functions was only one of the relevant factors in the decision. See also Marcum v. Dahl, 658 F.2d 731, 734 (10th Cir. 1981) (court cited Schmidt for the proposition that "problems created by the controversy between the scholarship and non-scholarship players were internal problems with which defendants [athletic directors at university] were required to deal in their official capacities. Such matters are not

of general public concern.") The fact that the speech at issue occurred during or as a part of an employee's official duties is but one consideration in the Connick-Pickering inquiry. Nonetheless, it is a significant factor which may frequently lead to a finding that speech is unprotected, because, as we discuss more fully infra when we conduct the Pickering balancing in this case, speech in the course of an employee's duties will usually, if not always, reflect upon the employee's competence to perform his or her job.

Two recent cases from other circuits are instructive. In Gomez v. Texas Dept. of Mental Health and Mental Retardation, 794 F.2d 1018 (5th Cir. 1986), the court found that comments by an employee of a state treatment facility for the mentally ill did

not address matters of public concern. The state employee's duties in Gomez included coordinating the transfer of patients from the state center to a county center providing similar treatment. The comments were directed to an employee of the county center and concerned the length of time patients stayed at the state center prior to transfer to the county center. In conducting the public concern inquiry, the court noted that the statement "took place in the course of a routine meeting whose purpose was to coordinate the transfer of patients from one government facility to another, [and] was made to an employee of the County Center responsible for some of the transferred patients." Id. at 1021. Similarly, in Egger v. Phillips, 710 F.2d 292, 315 (7th Cir.), cert. denied, 464 U.S.

928 (1983), the court stated that, "given that [the employee] was in a very real sense performing his official function as an FBI agent in investigating and reporting his suspicions about . . . [a co-employee] . . . to his superior, the question of whether [the employee] was speaking as a concerned citizen and whether his speech touched on a matter of public concern invoking First Amendment protection would have been in doubt to a reasonable person in light of contemporaneous authority."[15] Thus, courts

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[15] The court in Egger also impliedly rejected the rationale of Schmidt as establishing a per se content-based rule exempting "peculiarly internal matters of governmental employment" from First Amendment protection. Egger, 710 F.2d at 316. In so doing the court stated, "the courts which suggest otherwise in our view are merely sub silentio striking the Pickering balance in cases which are probably too clear to require extended analysis." Id. While the decision in Egger was written prior to the Supreme Court's

which have addressed the issue have declined to establish a per se rule exempting speech made in the course of an employee's official duties, but have viewed that fact as militating against a finding that the speech addressed matters of public concern. Similarly, it is a significant factor in the balancing required under Pickering.

C. Whether Koch's Speech Was On a Matter of Public Concern.

The district court granted the City's motion for judgment n.o.v. because it held that Koch's speech did not involve a matter of public concern within the meaning of Connick. We agree.

As indicated, we must consider the

Connick decision, the court viewed Connick as providing "additional support for our decision in this case regarding the free speech issue." Id. at 294 n.*.

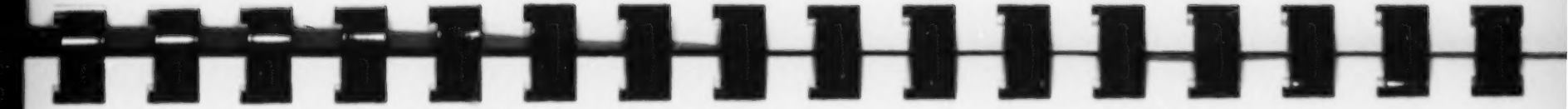
content, form and context of the speech in question to determine whether it relates to a matter of public concern. While cautioning that it is neither "appropriate [n]or feasible to attempt to lay down a general standard against which all [public employee] statements may be judged," Pickering, 391 U.S. at 569, the Supreme Court has broadly defined "public concern" as follows: "[W]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary." Connick, 461 U.S. at 146. The Court in Connick contrasted speech "as a citizen upon matters of public concern" with speech "as an

employee upon matters only of personal interest." Id. at 147.

The facts of Connick illustrate the content, form and context inquiry. In Connick, the plaintiff-employee, Myers, was an assistant district attorney, who, upon learning of her impending transfer to a different section of the criminal court, expressed dissatisfaction concerning that transfer to her superiors, including Connick, the District Attorney. She met with one of her superiors and discussed her transfer as well as various other office matters. After being told that her concerns were not shared by others in the office, Myers prepared a questionnaire soliciting the views of her co-workers on "office transfer policy, office morale, the need for a grievance committee, the level of

confidence in supervisors, and whether employees felt pressured to work on political campaigns." Id. at 141. She distributed the questionnaire during office hours the following day, which caused one of her superiors to inform Connick that Myers was creating a "mini-insurrection." Connick then fired Myers on the stated grounds that she refused to accept the transfer and her distribution of the questionnaire amounted to insubordination.

Myers brought suit under 42 U.S.C. (1983, alleging that her employment was terminated in violation of her First Amendment rights. The Supreme Court ultimately disagreed, holding that Myers' questionnaire, except as it related to the question concerning pressure to work on political campaigns, did not touch upon



matters of public concern. Rather, looking at the context of the speech, the Court viewed the bulk of the questions "as mere extensions of Myers' dispute over her transfer to another section of the criminal court." Id. at 148. With regard to the content of the speech, the Court rejected the argument that those questions "are of public import in evaluating the performance of the District Attorney as an elected official." Id. more specifically, the Court stated:

> Myers did not seek to inform the public that the District Attorney's Office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases. Nor did Myers seek to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others.

Id. thus, since the "focus" of her

questionnaire was "to gather ammunition for another round of controversy with her superiors", no matters of public concern were implicated.[16] Id.

In contrast to Connick, in both Pickering and Rankin the Supreme Court found

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[16] While the Court concluded that most of Myers' questionnaire did not relate to matters of public concern, it held that the question relating to pressure to work on political campaigns for office-supported candidates did "touch" upon a matter of public concern "in only a most limited sense." Connick, 461 U.S. at 149, 154. This was so because of the question's content: "official pressure upon employees to work for political candidates not of worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights" and "there is a demonstrated interest in this country that government service should depend upon meritorious performance rather than political service." Id. at 149 (citations omitted). Because a matter of public concern was involved, the Court applied the Pickering balancing test and concluded that Connick's decision to terminate Myers' employment did not infringe upon Myers' First Amendment rights.

speech on matters of public concern. In Pickering, appellant Pickering, a high school teacher, wrote a letter to a local newspaper critical of the local school board's methods of informing taxpayers of the reasons why additional revenues for schools were needed. The letter also criticized the way the school board allocated money between educational and athletic programs. The letter was sent in the context of the school board's proposed tax increase to raise money for educational purposes and was in response to articles attributed to a local teachers' organization and a letter from the superintendent of schools, all of which appeared in local newspapers, urging passage of the tax increase. The Supreme Court, focusing implicitly on the content of the speech,

concluded that "the question whether a school system requires additional funds is a matter of legitimate public concern" requiring "free and open debate." Pickering, 391 U.S. at 571-72.

Rankin similarly involved speech on a matter of public concern. In that case, Rankin, the constable of Harris County, Texas, fired McPherson, a deputy constable whose duties were "purely clerical" for stating, in response to the news that someone had attempted to assassinate the President of the United States, "if they go for him again, I hope they get him." Rankin, 107 S. Ct. at 2895. Viewing the statement "in context" the Supreme Court concluded that "it plainly dealt with a matter of public concern" because it "was made in the course of a conversation

addressing the policies of the President's administration" and because it "came on the heels of a news bulletin regarding what is certainly a matter of heightened public attention." Id. at 2898. The Court noted that "[t]he inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." Id.

Lower court efforts to draw more specific guidance from the Supreme Court's language and case law have resulted in a variety of statements and decisions. In Wilson v. City of Littleton, Colorado, 732 F.2d 765 (10th Cir. 1984) this court examined the extent to which speech "directly addressed an important public issue." Id. at 768 (emphasis in original). In analyzing Connick. the court stated:

> in rejecting the other questions in Myers' questionnaire as outside the "rubric of matters of 'public concern,' " we do not understand the Court to be saying that the performance of a district attorney's office or of a district attorney as an elected official is not of public concern. Rather, it apparently was the Court's view that the other questions in Myers' questionnaire, while "related to an agency's efficient performance, "did not sufficiently inform the issue as to be helpful to the public in evaluating the conduct of government.

Id. (citations omitted) (emphasis original in part, added in part). The court went on to conclude that:

> In order for a public employee's speech to be "of public concern," . . . it is not always enough that "its subject matter could in [certain] circumstances, [be] the topic of a communication to the public that might be of general interest." What is actually said on that topic must itself be of public concern.

Id. at 769 (citations omitted) (emphasis original). Thus, this circuit has already indicated that what is of general interest to the public is not necessarily of public concern for First Amendment purposes. See also Piver v. Pender County Bd. of Educ., 835 F.2d 1076, 1079-80 (4th Cir. 1987) ("[T]he focus is . . . upon whether the 'public' or the 'community' is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a 'private' matter between employer and employee.") (quoting Berger v. Battaglia, 779 F.2d 992, 998-99 (4th Cir. 1985)); Callaway v. Hafeman, 832 F.2d 414, 416 (7th Cir. 1987) ("The correlation implicit in premising free speech on the need for promoting social and political change . . . is that speech that

does not have such concerns as its goal will be afforded less protection generally, and specifically when viewed in the context of public employment cases."); Wren v. Spurlock, 798 F.2d 1313, 1317 n.1 (10th Cir. 1986) cert. denied, 107 S. Ct. 1287 (1987) ("We recognize that it is not always enough that the subject matter of a communication be one in which there might be general interest, . . . but that what is actually said on the topic is the crux of the public concern content inquiry.")(emphasis original; citations omitted); Egger v. Phillips, 710 F.2d 292, 316-17 (7th Cir.) cert. denied, 464 U.S. 918 (1983) ("[I]n assessing whether the speech touches upon a matter of public concern, it is important not to equate the public's curiosity about a matter with a matter having societal

ramifications.")

After Connick, many courts have particularly focused on the extent to which the content of the employee speech was calculated to disclose wrongdoing or inefficiency or other malfeasance on the part of governmental officials in the conduct of their official duties. See, e.g., Daniels v. Quinn, 801 F.2d 687, 690 (4th Cir. 1986) ("[T]his circuit has held that matters of public concern for these purposes must relate to wrongdoing or a breach of trust, not ordinary matters of internal agency policy.") Cox v. Dardanelle Public School Dist., 790 F.2d 668, 672 (8th Cir. 1986) ("The focus is on the role the employee has in advancing the particular expressions: that of a concerned public citizen, informing the public that the state

institution is not properly discharging its duties, or engaged in some way in misfeasance, malfeasance or nonfeasance; or merely as an employee, concerned only with internal policies or practices which are of relevance only to the employees of that institution.") Knapp v. Whitaker, 757 F.2d 827, 840 (7th Cir.) cert. denied, 474 U.S. 103 (1985) (In finding that the employee/school teacher's communications with school board members concerning classroom assignments and personal evaluations was not on a matter of public concern, the court stated that the employee's speech "was not an attempt to inform the public that the administrators in District 150 were failing to discharge their governmental responsibilities," and it "was not aimed at uncovering a wrongdoing or

breach of the public trust."); McKinley v. City of Eloy, 705 F.2d 1110, 1114 (9th Cir. 1983) ("Speech by public employees may be characterized as not of 'public concern' when it is clear that such speech deals with individual personnel disputes and grievances and that the information would be of no relevance to the public's evaluation of the performance of governmental agencies.").[17]

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[17] Accordingly, where an employee sought to disclose wrongdoing, inefficiency or malfeasance courts have typically found speech on matters of public concern. See, e.g., Southside Pub. School v. Hill, 827 F.2d 270 (8th Cir. 1987) (school teachers' complaints regarding deficiencies in implementation of federal handicapped pupil program were on matters of public concern"); Marohnic v. Walker, 800 F.2d 613 (6th Cir. 1986) (speech consisting of talking to and cooperating with attorney general's investigation into possible fraudulent billing by public agency touched on matter of public concern); Wren v. Spurlock, 798 F.2d 1313 (10th Cir. 1986), cert. denied, 107 S. Ct. 1287 (1987) (letter from teachers to an education association seeking an investigation and complaining of high

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faculty turnover and sexual harassment of students and teachers was on a matter of public concern); Brasslett v. Cota, 761 F. 2d 827 (1st Cir. 1985) (comments by fire chief to local press concerning the level of fire protection of town were "prototypical matter of public concern"); Czurlanis v. Albanese, 721 F.2d 98 (3d Cir. 1983) (employee allegations of inefficiency, fraud and waste in Division of Motor Vehicles were on matters of public concern); McKinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1983) (speech concerning rate of compensation for police force and working relationship between police union and elected officials was on matter of public concern); Key v. City of Rutherford, 645 F.2d 880 (10th Cir. 1981) (communication by police chief to mayor concerning increasing police department budget so as to improve level of police protection was on matter of public concern); Wulf v. City of Wichita, 644 F. Supp. 1211 (D. Kan. 1986) (letter alleging misconduct by police chief, including interference with right of union membership and misuse of public funds, and requesting official investigation, was on matter of public concern); cf. Saye v. St. Vrain Valley School Dist. RE-IJ, 785 F.2d 862 (10th Cir. 1986) (complaint concerning allocation of aide time among teachers was "not a matter inherently of public concern"); Jurgensen v. Fairfax County, 745 F.2d 868 (4th Cir. 1984) (release to press of internal police audit report detailing grievances concerning working conditions but

The Seventh Circuit has turned this aspect of the analysis into an inquiry into the motive of the speaker. See Callaway v. Hafeman, 832 F.2d 414, 417 (7th Cir. 1987) (the Connick 'test requires us to look at the point of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?' ") (quoting Linhart v. Glatfelter, 771 F.2d 1004, 1010 (7th Cir. 1985)).

As the Supreme Court has explicitly

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not exposing any illegality, abuse of authority, corruption or waste was not on matter of public concern); Wilson v. City of Littleton, 732 F.2d 765 (10th Cir. 1984) (wearing by police officer of black shroud on badge as personal expression of grief at death of another officer was not on matter of public concern.)

stated, context is also important. While the Court has made clear that "[t]he private nature of the statement does not . . . vitiate the status of the statement as addressing a matter of public concern," Rankin, 107 S. Ct. at 2898 n.11 (citing Givhan v. Western Line Consolidated School District., 439 U.S. 410, 414-16 (1979)), other aspects of the context of the employee's communication may affect the public concern inquiry. In Connick, the Supreme Court viewed the employee's speech (the questionnaire) as essentially growing out of and as merely an extension of an underlying employment dispute. The employee comment in Rankin, although clearly private and occurring while on the job, as in Connick, was in the context of a discussion of the President's policies and can,

therefore, be viewed as itself "political speech" or the "hyperbolic expression of a political opinion." Am. Postal Workers Union, AFL-CIO v. United States Postal Service, 830 F.2d 294, 320 (D.C.Cir. 1987) (Bork, J. dissenting). The employee letter in Pickering publicly expressed criticism of the school board in the face of previous articles and a letter publicly expressing the school board's own position. See also, e.g., Perry v. Sindermann, 408 U.S. 593 (1972) (college teacher's legislative testimony in favor of granting four-year status for college found to be on matter of public concern); Piver v. Pender County Bd. of Educ., 835 F.2d 1076, 1080 (4th Cir. 1987) ("The [employee] speech took place primarily in a public meeting called for the purpose of discussing [a school

principal's] tenure" and it was "directed to a small community in which the speaker and the subjects of his speech were personally known by almost everyone."); Saye v. St. Vrain Valley School Dist., RE-1J, 785 F.2d 862, 866 (10th Cir. 1986) (In holding that teacher's complaints about allocation of aide time among teachers did not involve a matter of public concern, court noted that "Saye did not raise the aide issue in a public forum."); Waters v. Chaffin, 684 F2d 833, 837-38 (11th Cir. 1982) (police officer's criticism of police chief while off-duty and out of uniform was protected).

With these general guidelines in mind, we turn to the content, form and context of Koch's speech to determine if it addressed a matter of public concern, the threshold inquiry in the Pickering balancing test. We

hold that it did not.

With regard to the content and form of Koch's speech, his official report stated his professional opinion as to the cause of a fire in which a small child died. As we have indicated, we view the fact that his speech took place in a report in the course of his official duties as a factor which weighs against, in the circumstances of this case, a finding that his speech involved matters of public concern for the purposes of the First Amendment. His written report was simply one of many routine official reports which are processed through the City's local governmental agencies on a daily basis. While the conduct of local government is, broadly speaking, an obvious matter of public concern, absent a more compelling circumstance than the simple fact

that Koch's report was a routine governmental report, we conclude that Koch's expressed opinion in his report does not address a matter of public concern. In view of other aspects of the content, form and context of his report, we find no such compelling circumstance.

As the Supreme Court has stated, speech "not otherwise of public concern does not attain that status because its subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest." Connick, 461 U.S. at 148 n.8. We certainly agree that the City's discharge of its duty to investigate fires and determine their cause could be a matter of great public concern. Similarly, Koch's own competence to perform his job could be a

matter of public concern, as could the cause of a fire in which a person died or a disagreement between city officials as to that cause. Nonetheless, Koch's report did not "sufficiently inform the issue as to be helpful to the public in evaluating the conduct of government." Wilson, 732 F.2d at 768 (emphasis removed); see also Callaway v. Hafeman, 832 F.2d 414, 417 (7th Cir. 1987) (While the plaintiff school employee's "communications touched upon an issue of public concern generally, she was not attempting to speak out as a citizen concerned with problems facing the school district."). [18] And while Koch's speech may

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[18] Contrary to Koch's suggestion, we do not view his official report on the cause of a fire as speech on a matter "inherently" of public concern, as the Supreme Court in Connick, 461 U.S. at 148 n.8, characterized the plaintiff's protest of racial discrimination in Givhan v. Western Line

indeed not have been motivated by personal interest, that fact alone does not transform his speech into speech on a matter of public concern.

Koch asserts that his speech "was calculated to inform and alert the public about the city government's discharge of its duty to investigate arson" and that his "objective was to inform his superiors of what he believed to be arson and then the public of what he believed was defendants' misfeasance," Supplemental Brief of Appellant at 8 (quoting Koch v. City of Hutchinson, 814 F.2d 1489, 1498 (10th Cir. 1987). The record simply does not support such a conclusion. Koch's deposition reveals that he had compiled a list of

Consol. School Dist., 439 U.S. 410 (1979).

alleged improprieties on the part of certain City officials, including several defendants in this case, which he hoped to reveal in the course of his state and federal lawsuits. In his testimony Koch suggested that O'Sullivan's investigation of him and O'Sullivan's involvement of other law enforcement personnel was, in Koch's view, improper. Koch's counsel attempted throughout the trial to discredit the validity of the other investigators' reports and investigative techniques. But there is no evidence that Koch's fire investigation report and his conclusion as to the cause of the fire was in any way motivated or inspired by such alleged improprieties or by the desire to expose those improprieties.

Koch's remaining two arguments concerning media publicity of his report and

subsequent events and public access to the report through the Kansas "sunshine" laws do not persuade us that his speech addressed a matter of public concern.

Koch argues, citing Wichert v. Walter, 606 F. Supp. 1516 (D.N.J. 1985), " "[t]hat the arson was a 'major topic' in Hutchinson and 'generated' newspaper headlines in the local newspaper only cements the public concern aspect of plaintiff's speech." Supplemental Brief of Appellant at 19.[19] Media publicity of the dispute is not

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[19] A pretrial conference order lists among plaintiff's exhibits numerous newspaper articles dating from the time of the fire to August, 1980, and covering the actual fire and ensuing events up to and including Koch's lawsuits. R. Vol. I at 49-51. The record reveals that seven articles appeared concerning the fire, the dispute between Koch and others as to the cause of the fire, and Koch's suspension and demotion.

determinative of the question of whether Koch's speech was on a matter of public concern for First Amendment purposes. We agree with the Seventh Circuit when it stated:

> We do not believe, however, that the scope of an employee's freedom of speech can turn on his ability to convince a newspaper to print a story about his plight. The factors which determine whether a story is newsworthy are hardly coterminus (sic, coterminous) with the factors which determine whether the communication has societal ramifications, and in any event, newspaper editors cannot decide the question for us.

Egger v. Phillips, 710 F.2d 292, 317 (7th Cir.), cert denied, 464 U.S. 918 (1983). The fact that Koch himself did not disclose the contents of his report to the local media does not change our view that media publicity cannot be determinative of whether an employee's speech is protected by the

First Amendment. See also Connick, 461 U.S. at 160 n.2 (Brennan, J. dissenting) (majority opinion found Myers' questionnaire, with one exception, did not touch matters of public concern despite "extensive local press coverage"); but see Germann v. Kansas City, 776 F.2d 761, 764 n.2 (8th Cir. 1985), cert. denied, 107 S. Ct. 63 (1986) ("[B]ecause appellant's letter concerned implementation of the fire plan during a time of great media attention, it addressed a matter of public concern"); Monsanto v. Quinn, 674 F.2d 992, 997 (3d Cir. 1982) ("[W]here . . . the communication concerns an issue of public interest, as evidenced by the local news media's assessment that the communication is newsworthy, 'entirely different considerations . . . come into play.'")

(quoting Roseman v. Indiana Univ., 520 F.2d 1364, 1368 n.11 (3d Cir. 1975), cert. denied, 424 U.S. 921 (1976)). Accordingly, the fact that Koch's report and ensuing events received some media coverage does not convince us that his speech touched upon a matter of public concern for purposes of the First Amendment.

Finally, Koch relying on the majority opinion of the previous panel of this court, argues that Kansas law gives the public access to investigative reports prepared by Fire Marshals such as Koch under Kansas "sunshine" acts. See Kan. Stat. Ann. {{ 31-137 and 45-215. Accordingly, Koch claims that such reports are of public concern within the meaning of the First Amendment. We disagree. Even assuming that Kansas law does not grant public access to

investigative reports such as Koch's, we hold that such public access under state sunshine laws is irrelevant to the question of whether such reports contain information of public concern for the purposes of the First Amendment. We agree with the Fifth Circuit which strongly rejected the argument that a public employee's speech addressed a matter of public concern because the employee's statement was public under applicable state law, stating:

> Though a state may choose to provide broader rights under its own laws than those granted by the federal Constitution, it has no power to enlarge that scope of federal rights themselves. Whether or not the state of Texas would characterize the speech in question as addressed to a matter of public concern is therefore irrelevant to the federal issue.

Gomez v. Texas Dept. of Mental Health and Mental Retardation, 794 F.2d 1018, 1022-23

(5th Cir. 1986) (citations omitted). The fact that Koch's investigative report on the cause of a fire may be accessible to the public under applicable Kansas law has no bearing upon the question of whether such a report touches upon matters of public concern within the meaning of the First Amendment.

In sum, considering the content, form and context of Koch's speech, we hold that it did not involve a matter of public concern for the purpose of the First Amendment.

D. Balancing Under Pickering.

Even were we to conclude that Koch's speech touched, even tangentially, upon a matter of public concern, we would nonetheless conclude that it is unprotected under the First Amendment because it fails

the Pickering balancing test.

As indicated, Pickering requires us to balance the interests of the employee in making the statement at issue against the interests of the state, as an employer, in promoting the efficient provision of services. "In performing the balancing, the statement will not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose." Rankin, 107 S. Ct. at 2898 (citing Connick, 461 U.S. at 152-53; Givhan v. Western Consolidated School Dist., 439 U.S. 410, 415 n.4 (1979)).[20]

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[20] Different considerations may come into play in the Pickering balance, depending on whether the employee's speech is made in a public or private forum.

> When a teacher speaks publicly, it is generally the content of his

The Supreme Court has "recognized as pertinent considerations whether the statement impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the

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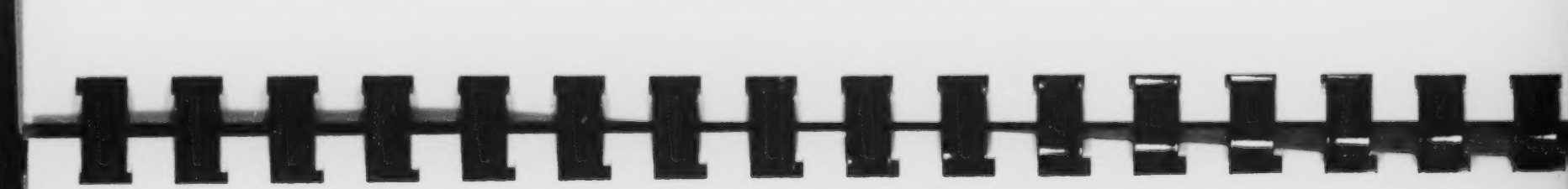
> statements that must be assessed to determine whether they "in any way either impeded the teacher's proper performance of his daily duties in the classroom or . . . interfered with the regular operation of the schools generally." Private expression, however, may in some situations bring additional factors to the Pickering calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered.

Givhan v. West. Line Consol. School Dist., 439 U.S. 410, 415 n.4 (1979).

speaker's duties or interferes with the regular operation of the enterprise." Rankin, 107 S. Ct at 2899 (citing Pickering, 391 U.S. at 570-73). The government's interest in the Pickering balancing therefore "focuses on the effective functioning of the public employer's enterprise." Id.

Rankin has further made clear that employee's responsibilities within the workplace are relevant to the Pickering balancing. "The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails." Id. at 2900; see also Jurgensen v. Fairfax County, 745 F.2d 868, 880 (4th Cir. 1984) ("In considering the second part of the Pickering-Connick test, courts must give

weight to the nature of the employee's job in assessing the possible effect of his action on employee morale, discipline or efficiency."); Egger v. Phillips, 710 F.2d 292, 319 (7th Cir. 1983) ("While these interests [of the government as employer] are ever present, their strength and applicability in any given employment situation depend on both the nature of the tasks performed by the particular employee and the mission of the agency for which he works."); McKinley v. City of Eloy, 705 F.2d 1110, 1115 (9th Cir. 1983) ("plaintiff was simply a rank and file public officer."). In Rankin, the fact that the employee's duties included "no confidential, policymaking, or public contact role" was a factor weighing in favor of the employee's interest in making the speech at issue. Rankin, 107 S.



Ct. at 2900.

Finally, different considerations come into play if the disputed speech reflects negatively on the employee's ability and competence to perform his or her job. The Supreme Court in Pickering specifically noted that:

> [T]his case does not present a situation in which a teacher's public statements are so without foundation as to call into question his fitness to perform his duties in the classroom. In such a case, of course, the statements would merely be evidence of the teacher's general competence, or lack thereof, and not an independent basis for dismissal.

Pickering, 391 U.S. at 573 n.5; see also Rankin, 107 S. Ct. at 2899 (Rankin's discharge "was not based on any assessment by the constable that the remark demonstrated a character trait that made

respondent unfit to perform her work."); Wren v. Spurlock, 798 F.2d 1313, 1318 (10th Cir. 1986) ("In view of this evidence of Wren's continuing competence, the Pickering balance tips in her favor."); Egger, 710 F.2d at 318 ("To the extent that the disagreements between [plaintiff] and [employer] represent a professional difference of opinion regarding the strength of the case against [a co-employee], [plaintiff's] communications could be viewed as evidence of a lack of professional competence, and a recommendation based on such an assessment of the communications implicates internal agency concerns.")

Applying those factors to this case, we hold that the Pickering balance clearly tips in favor of the employer, the City. As the Supreme Court has stated, the manner, time

and place of employee speech are relevant to the Pickering balance, as is the context of the speech. Koch's speech occurred in the course of and as a part of his official duties. While we have declined to establish a per se rule regarding speech made as a part of an employee's official functions, the fact that the speech occurs in such a situation is an important factor in the Pickering balancing, just as it is a factor in the threshold public concern inquiry. See Connick, 461 U.S. at 153 ('[T]he fact that [the employee] . . . exercised her rights to speech at the office supports [the employer's] fear that the function of his office was endangered.") (emphasis added).

Furthermore, we hold that the City was entitled to evaluate Koch's official report, prepared and submitted in the course of his

normal duties as Fire Marshall, as a reflection upon his ability and competence to perform his job. Accordingly, the City was entitled to view Koch's report as reflecting negatively upon his ability and competence because of, among other things, its omission of the laboratory analysis suggesting a possible accidental cause of the fire.[21] Indeed, Koch's demotion was based in part on his omission of the laboratory analysis and on a "lack of confidence . . . in his ability to rationally and professionally conduct an investigation." R. Supp. Vol. XIX, Pl.'s

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[21] Koch's immediate superior, Fire Chief Jones, testified that "good judgment" would have required inclusion of the lab report. R. Vol. XI at 177. Koch himself testified that inclusion of the report "would have improved the technicality of the report." R. Vol. XV at 1411.

Ex. 10.

We agree with the Seventh Circuit's discussion of this point in Egger, cert. denied, 464 U.S. 918 (1983):

> From the interview with an applicant for a position to discussions with the employee about the proper discharge of his duties, the content of an employee's speech naturally affects his superior's assessment of him and forms the basis of personnel decisions. . . . [The employee's superior in this case] was entirely justified in evaluating the soundness of [the employee's] investigative technique, the inferences he drew from certain informant statements, and the overall soundness of his conclusion that certain leads were worth pursuing. . . . [The employee] was simply doing his job as a criminal investigator, and the quality of that work was something [his superior] routinely had to assess.

Egger, 710 F.2d at 316, 317, 318 (citations omitted). Similarly, Koch's superiors were justified in "evaluating the soundness" of

his 'investigative technique, the inferences he drew" from certain evidence, and "the overall soundness of his conclusion" that the fire was the result of aggravated arson. Koch's superiors were therefore entitled to consider the content of his investigative report, including his opinion as to the causation of the fire, in evaluating his competence to perform his job.

Additionally, there is evidence that Koch's report had a "detrimental impact on close working relationships for which personal loyalty and confidence is necessary," within the meaning of Rankin, 107 S. Ct. at 2899. The record discloses that Koch's report generated considerable friction and disharmony between Koch and O'Sullivan, who, although not Koch's immediate superior, was the person to whom

Koch's report was addressed and the person who had to decide, based at least in part on Koch's report, whether further action was required in connection with the fatal fire. Koch's report, with its omission of the laboratory report, prompted an investigation by O'Sullivan because he felt the omission, as well as Koch's statement to him in the May 30 meeting that the laboratory results were "negative," might constitute official misconduct. The investigation, with its resultant reports by other investigators which conflicted with Koch's report, confirmed O'Sullivan and Jones' concerns about Koch's competency and itself generated further friction between Koch and other agencies and investigators. Jones testified that in the May 30 meeting between himself, Koch, O'Sullivan and others, Koch refused to

explain the basis for his conclusions that arson caused the fire. R. Vol. X11 at 364-65. Jones further testified that O'Sullivan felt he could not "sit down with and conduct a constructive interview" with Koch, R. Vol. X11 at 381, and that others who investigated the fire found Koch uncooperative. Id. at 500-01. Furthermore, O'Sullivan's July 13 letter to Jones, detailing his concerns regarding the whole affair, explicitly stated that he had a "total lack of confidence in his [Koch's] opinion and in his ability to rationally and professionally conduct an investigation," and that he would "not accept a report from . . . [Koch] as the basis of a criminal charge nor do I feel that I could ever call him as a State's witness and sponsor him as credible and reliable." Pl.'s Ex. 10 (emphasis added).

Accordingly, while significant disharmony between Koch and others occurred during the investigation subsequent to his report, the report was the event which triggered those investigations and subsequent disruption of working relationships. Cf. Rankin, 107 S. Ct. at 2899 (no evidence that the employee's statement interfered with the efficient functioning of the office); Jungels v. Pierce, 825 F.2d 1127, 1132 (7th Cir. 1987) (no evidence of disruption of employer operations); Czurlanis v. Albanese, 721 F.2d 98, 106 (3d Cir. 1983) ("[T]here is no evidence that the relationship between [the employee] and his immediate superiors was seriously undermined."); Brasslett v. Cota, 761 F.2d 827, 845 (1st Cir. 1985) (no evidence of detrimental impact in necessary working relationship).

The nature of the ongoing working relationship between Koch, O'Sullivan and other agencies underscores the significance of the City's interest in preventing disruption of those relationships. "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." Connick, 461 U.S. at 151-52. Jones testified as to the importance of having a good working relationship between members of the Fire Marshal's office and the police whenever a fire results in a fatality. R. Vol. X11 at 501-02. O'Sullivan testified that "every time there was . . . a[n arson] fire, the police department became involved." R. Vol. XV1 at 1572. As Koch's own testimony indicated, his office and the police

investigate simultaneously and communicate continuously concerning any fire in which a fatality occurs.[22] O'Sullivan further

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[22] A number of cases have emphasized the heightened governmental interest in maintaining harmony among employees in the law enforcement context, where "[m]utual trust and respect among [employees] . . . are particularly important" and "[t]he need for confidentiality cannot be gainsaid." Egger, 710 F.2d at 319; see also Brasslett v. Cota, 761 F.2d 827, 845 (1st Cir. 1985) ("[T]rust and confidence were essential to an effective working relationship between the Fire Chief and the Town Manager."); Jurgensen, 745 F.2d at 880, ("In a case . . . involving . . . employment in a police department, it is important . . . to take account of the special character of such department in determining the matter of 'the government's interest.'"); Waters, 684 F.2d at 839 (police department has particular interest in maintaining discipline and "esprit de corps."). We view the function of the Fire Department in which Koch worked to be sufficiently analogous to police departments and FBI agencies to produce a heightened governmental interest in maintaining harmony among employees of the Fire Department, such as Koch, and other law enforcement personnel. See generally Germann v. Kansas City, 776 F.2d 761, 764 (8th Cir. 1985), cert. denied, 107 S. Ct. 63 (1986) (court noted necessity of personal

testified that, if a criminal prosecution were instituted, he would ordinarily rely on Koch as his "chief witness". R. Vol. XV1 at 1729. He stated as follows concerning his reliance on the Fire Marshal's report in prosecuting an arson case:

> I had to be personally satisfied or convinced myself from any case that I ever filed that the person accused did the acts that he was accused of, and that that constituted a criminal offense. And ever [sic] witness that I then use to prove that charge, I had to have absolute confidence in, especially in a case where you're talking about an area in which my witness has greater expertise than I do. . . . And I felt like I had to have absolute confidence in the objectivity and the professionalism of the person whose opinion I was advocating before I would proceed on a case, and in this particular case, I did

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loyalty to fire chief); Bickel v. Burkhart, 632 F.2d 1251, 1257 (5th Cir. Unit A 1980) ("Because of the nature of firefighting and its higher stakes, operational efficiency and harmony among co-workers are critical.")

> not have that in Tom Koch, I did not feel that I ever would, and frankly, did not want him coming over to the office any more with his opinions because I wouldn't proceed in a criminal case based upon his opinion.

R. Vol XVI at 1586. The City Manager, Pyle, testified that there was an "absolute requirement that they [Koch and the county attorney] cooperate with each other." R. Vol. XIV at 1114. Accordingly, although Koch and O'Sullivan did not work together on a daily basis, they could, in arson prosecutions, have a working relationship requiring mutual trust and confidence. See also Saye v. St. Vrain Valley School Dist., 785 F.2d 862, 866 (10th Cir. 1986) (Speech was sufficiently disruptive, and therefore un-protected, where it affected relationship between parents of special education children and teachers).

Finally, Koch's position within the workplace and his responsibilities further persuade us that the Pickering balance clearly tips in favor of the City. Unlike the "purely clerical" employee in Rankin, whose speech was protected under the First Amendment, Koch had a greater "confidential, policymaking, or public contact role." See Rankin, 107 S. Ct. at 2900. Koch's duties included the investigation of fires and the determination of cause, as well as the supervision of subordinate fire inspectors. He obviously had contact with the public in the course of those investigations and exercised considerable professional expertise and discretion in conducting such investigations. His opinion as to the cause of a suspicious fire would be a factor in the decision of the county attorney to

investigate further and possibly file criminal charges in connection with a fire. In sum, Koch's job entailed the exercise of judgment, discretion and authority, in contrast with the job of the plaintiff in Rankin, and therefore the City had a greater interest in considering his speech when making an employment decision.

We have considered the many factors applicable to the Pickering balancing test and hold that the City's interest in implementing a personnel decision on the basis of Koch's speech in the circumstances of this case clearly outweighed his interest in making the speech in question. Koch's written report reflected upon his competency and ability to perform his job and caused evident disruption of necessary working relationships between Koch and others. As

a result, the City's ability to efficiently perform its necessary duties was significantly impaired. We therefore hold that the City did not violate Koch's First Amendment rights when it demoted him from Fire Marshal to Fire Prevention Inspector.

CONCLUSION

For the foregoing reasons we affirm the judgment of the district court granting judgment n.o.v. to the City, setting aside the jury verdict in Koch's favor and entering judgment for the City.

No. 83-2561 - KOCH v. CITY OF HUTCHINSON, et al

McCAY, Circuit Judge, concurring statement:

I concur in the court's opinion. The key in the difficult task of applying the general principles to the facts of this case lies in the fact that official reports cannot be immunized from competency judgments just because they involve subjects which are inherently dramatic and likely to attract public attention. I am satisfied that the court's opinion takes into account all the relevant factors and gives them, on balance, the proper weight.

No. 83-2561, KOCH v. CITY OF HUTCHINSON

LOGAN, Circuit Judge, with whom Judge SEYMOUR joins, dissenting:

With respect, I must dissent from the en banc court's analysis of what is a matter of public concern and its application of the balancing test of Pickering v. Board of Education, 391 U.S. 563 (1968). In my opinion, the en banc court takes an unprecedented step by constricting the First Amendment protection of public employees who must investigate and report on controversial matters. The court also unjustifiedly supplants the jury's verdict with its own view of the evidence, in order to conclude under the Pickering test that the City of Hutchinson's interest in regulating Thomas Koch's speech clearly outweighs Koch's interest in stating his conclusion.

To focus properly, we must identify the precise issues presented to this court for review. The jury resolved all of the factual issues against the City of Hutchinson. The City neither complains of the jury instructions or verdict form nor argues that the evidence was insufficient to support the jury's verdict. The district court based its grant of judgment n.o.v. on the sole ground that Koch's "speech involved in this case cannot fairly be characterized as relating to a matter of 'public concern' and therefore the speech is not protected under the First and Fourteenth Amendments." I R. 365. The order granting en banc rehearing was limited to the issues discussed in the "protected speech" section of the panel majority's opinion and the dissent, which focused on Koch's report as

a "statement of his conclusions as a public employee limited to a matter within his official duties." See Koch v. City of Hutchinson, 814 F.2d 1489, 1500 (10th Cir. 1987) (Seth, J., dissenting).

In addressing this issue, the City sets forth three alternative arguments. First, the City advocates a per se rule that a public employee's statements made in the ordinary course of business can never be protected speech. Second, it argues that the speech here cannot be regarded as a matter of public concern. Finally, it asserts that even if Koch's statement is found to touch on a matter of public concern, that finding does not justify the broader conclusion that it is protected speech as defined in Connick v. Myers, 461 U.S. 138 (1983).

With respect to the City's first argument, I agree with the majority that there should be no per se rule denying First Amendment protection to speech uttered in the ordinary course of a public employee's business duties. Where I really part company with the majority is on the second issue--whether this speech touches on a "matter of public concern." The majority correctly states the law in the context in which this issue usually arises: where the question is whether the speech that caused an employee's discharge was mere griping or agitation over working conditions or internal policy decisions affecting the employee, as opposed to political commentary on an issue of public concern. That is, did the employee speak as employee or as citizen? Sometimes the lines are hard to

draw, but I generally agree with the balance the courts have struck when the issue is presented in this context.

Here, in contrast, we face a different situation: Koch is speaking "as an employee," and, although his speech is not pure political commentary, it also is not upon matters only of personal interest. Koch's report did not express a complaint about working conditions or internal policy. Instead, it stated that he believed a fire which claimed the life of a child had been deliberately set. Surely the majority would agree that the cause of a fatal accident as a nuclear power plant would be a matter of grave public concern, on a regional and perhaps national scale. The cause of a fire in which someone dies, particularly if that cause might be arson, stimulates grave

concern on a local level. And when, as in this case, law enforcement officials disagree about how such a fire started, the public should know about this disagreement, if for no other reason than to assess the conduct of government officials. See Connick, 461 U.S. at 148; id. at 161 (Brennan, J., dissenting) ("Unconstrained discussion concerning the manner in which the government performs its duties is an essential element of the public discourse necessary to informed self-government").[1]

The majority applies the "content, form and context" analysis of Connick, 461 U.S. at 147-48, concluding: "absent a more

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[1] Of course, a holding that speech addresses a matter of public concern only qualifies the speech for First Amendment protection; it does not guarantee that the speech will be protected. See Pickering, 391 U.S. at 568.

compelling circumstances than the simple fact that Koch's report was a routine governmental report, . . . Koch's expressed opinion in his report does not address a matter of public concern." Slip op. at 27. The majority views the context and form of Koch's speech--a "routine governmental report"--as weighing strongly against a finding of "public concern." I believe the majority misapprehends the basis of the content, form and context analysis required by Connick. In Connick, the context of the speech--a disgruntled employee challenging office policies--counseled strongly against finding her speech to address a matter of public concern. See 461 U.S. at 148. In that context, her speech had little or no value in informing public debate. Had the employee's questionnaire not been motivated

by purely private concerns and had she sought "to inform the public that the District Attorney's Office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases . . . [or] to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others," id., her speech, though concerning only intra-office policies, might have been quite helpful to the public in evaluating the performance of a public institution. Thus, in a different context, her speech might have merited First Amendment protection.

The context of Koch's speech--an official report prepared pursuant to duty--is quite different from the context of the speech in Connick. That Koch has spoken in

his position as fire marshal rather than as a "citizen" does not make his speech of less value to "informed decision--making by the electorate." Pickering, 391 U.S. at 572; Connick, 461 U.S. at 145. If anything, his duties and qualifications make this official speech more valuable. That Koch announced his conclusion in the form of an official report rather than in a press conference also does not diminish the value of the speech nor vitiate its status as addressing a matter of public concern. As the Supreme Court has held, "Neither the [First] Amendment itself nor our decisions indicate that [the] freedom [of speech] is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public." Givhan v. Western Line

Consolidated School District, 439 U.S. 410, 415-16 (1979); see also Rankin v. McPherson, 55 U.S.L.W. 5019, 5022 n.11 (U.S. June 24, 1987).[2]

The majority's result places government employees whose duties require conclusions on issues of intense public concern in an untenable position. Will a district attorney dare seek an indictment in a case

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[2] The panel opinion mentioned that the fire marshal's reports are public information, Koch, 814 F.2d at 1498, merely to underscore that it was certain that Koch's report identifying a fire as caused by aggravated arson was going to become public knowledge. We do not have to go so far as to analyze the right to search public records, because Reno County Attorney Joe O'Sullivan recognized it as a public concern matter when he gave the story to the newspaper reporter. Indeed, O'Sullivan's testimony at trial was that Koch accused him of a coverup in the arson investigation by not releasing Koch's report to the newspapers, and that Koch thought the law required public release within fifteen days. See XVI R. 1576, 1742.

of corruption of a popular official? Could a staff member of the Warren Commission conclude President Kennedy was shot for arranging an attempted Mafia assassination of Fidel Castro when the duty is to determine why Kennedy was assassinated? Will the county coroner report that a jail prisoner died of beatings rather than suicide? The majority's narrow construction of "public concern" leaves a host of public servants, including fire marshals, police, and coroners, under pressure not to report unpopular conclusions. This result is directly at odds with the Supreme Court's rationale for protecting speech in the public workplace. As the Court held in Rankin: "Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse . . .

simply because superiors disagree with the content of employees' speech." 55 U.S.L.W. at 5021.

My conclusion that a report of arson is a matter of public concern is fully consonant with the post-Connick case law cited by the majority. See cases cited in slip opinion at 21-25. In fact, a reader would anticipate from the manner in which the majority opinion describes the precedents that it is building up to a finding of public concern, rather than its opposite. For example, Piver v. Pender County Board of Education, 835 F.2d 1076 (4th Cir. 1987), cited by the majority, slip op. at 22, focuses "upon whether the 'public' or the 'community' is likely to be truly concerned with or interested in the particular expression, or whether it is more

properly viewed as essentially a 'private' matter between employer and employee." Id. at 1079-80 (quoting Berger v. Battaglia, 779 F.2d 992, 998-99 (4th Cir. 1985) (citations omitted)). The cause of a fatal fire is not just a private matter between employee and employer; rather, it is of true concern to the citizenry and thus, under Piver, a matter of public concern. Koch's speech would qualify similarly as being on a matter of public concern under the other cases the majority paraphrases. See, e.g. slip op. at 22, citing to Callaway v. Hafeman, 832 F.2d 414, 416 (7th Cir. 1987)' Wren v. Spurlock, 798 F.2d 1313, 1317 & n.1 (10th Cir. 1986), cert. denied, 107 S. Ct. 1287 (1987); and Egger v. Phillips, 710 F.2d 292, 316-17 (7th Cir.), cert. denied, 464 U.S. 918 (1983). Reason, sound policy, and precedent all

suggest that it is absurd to conclude that the statement, "It is my opinion this was an aggravated arson fire," was not on a matter of public concern.

On the en banc majority's view that this case involves no speech of public concern, it need not have reached the Pickering balancing test. But finding the speech to be on a matter of public concern does not end the inquiry. We must take the next step and apply the Pickering test. As the majority opinion notes, that test requires the court "to balance the interests of the employee in making the statement at issue against the interests of the state, as an employer, in promoting the efficient provision of services." Slip op. at 31; see Pickering, 391 U.S. at 568. The government bears the burden of demonstrating that its

interests outweigh the interests of the speaker. Rankin, 55 U.S.L.W. at 5022. If the government fails to carry this burden, the speech is protected.

The majority sets forth several reasons for tipping the Pickering balance in favor of the City of Hutchinson. First, the majority again weighs against Koch the fact that his speech was made in an official report. Slip op. at 34. But the majority provides no rationale for assigning the presumption against the employee; and as a general proposition the fact that the speech is contained in an official report should weigh in favor of the employee under Pickering. The government's interests "in promoting the efficiency of the public services it performs through its employees," Pickering, 391 U.S. at 568, generally are

advanced, not impaired, by protecting its decisionmakers' exercise of discretion. Fire marshals who can be demoted or terminated merely for arriving at an unpopular conclusion will be less likely to perform the job correctly and efficiently. Failing to protect the fire marshals' speech will chill the exercise of their discretion just as the threat of libel judgments would chill the news media's discussion of public issues and events. As the Court emphasized in Pickering, "the threat of dismissal from public employment is . . . a potent means of inhibiting speech." 391 U.S. at 574.

The majority, however, ignores the governmental interests in protecting speech in official reports and looks only at the "disruptive" aspects of Koch's statement. The relevant considerations on this aspect,

as the majority declares, are whether the statements (1) impairs discipline or harmony on the job, (2) has a detrimental impact on necessarily close working relationships, or (3) impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise. Slip op. at 32. This test requires courts to determine whether the particular speech in the particular context would be inherently or necessarily inflammatory and disruptive of the working relationships on the employee's job.

In Pickering the Supreme Court asked whether the speech at issue could "be regarded as per se detrimental," and asked whether it would "normally have any necessary impact" on the operations of the workplace. 391 U.S. at 571. The instant

case illustrates the problem perfectly. Does the mere fact that a fire marshal concludes that a fire he investigated was arson necessarily impair discipline or harmony with those with whom the marshal works, or detrimentally affect working relationships, or impede the performance of the marshal's duties? Of course not. This situation is unlike the one that would exist if Koch had encouraged citizens of Hutchinson to torch older buildings, or if an assistant prosecuting attorney commented favorably upon vigilantes taking the law in their own hands. Yet consider the effect Koch's demotions is likely to have on the next person to hold his position. Will the new fire marshal want to reach a conclusion with which county attorney O'Sullivan will disagree? Will he defend his conclusion as

vigorously as did Koch?

If speech is not per se disruptive, then the government must prove that the speech on matters of public concern actually created disruption in the workplace. See Rankin, 55 U.S.L.W. at 5022-23; Pickering, 391 U.S. at 570-71. When the government introduces some evidence of disruption, the court's role involves some weighing of the evidence. But the court must be careful not to go too far and determine issues that are properly for the factfinder. See Pickering, 391 U.S. at 578 n.2 ("even in cases where the upholding or rejection of a constitutional claim turns on the resolution of factual questions, we also consistently give great, if not controlling, weight to the findings of the state courts") (appendix to opinion of the Court).

After weighing the evidence for itself the majority holds that the City, based upon county attorney O'Sullivan's recommendations, was entitled to evaluate the report as reflecting negatively upon Koch's ability and competence to perform his job, partly because of his omission of the laboratory analysis suggesting a possible accidental cause of the fire. Slip op. at 35. It then says there is evidence that Koch's report had a detrimental impact on the working relationships on the job and analyzes in detail the poor relationship between Koch and O'Sullivan, which it attributes to this report. Slip op. at 36-39. And finally, because Koch was not a purely clerical employee and had a policymaking and public contact role, the majority says that the City had a

significant interest in regulating his speech. Slip op. at 39-40. Weighing these factors together, the majority holds that the City's interest in regulating the speech clearly outweighed Koch's interest in making the speech.

In my view the majority, under the guise of applying the Pickering balancing test, usurps the jury's function of determining why Koch was demoted. The linchpin of the City's argument is that Koch deliberately withheld evidence and that county attorney O'Sullivan and, later, Koch's superiors in the city government, were therefore justified in losing confidence in him. From the majority's recitation of the evidence on this issue, one would think that there was no dispute that Koch engaged in this deception. If the

evidence were as one-sided as the majority states it, then the majority's Pickering analysis might be correct. But this is not an open and shut case. Rather, the majority overlooks those parts of the record that support the jury's verdict. For example, the majority does not mention that O'Sullivan took exception to Koch's conclusions before O'Sullivan ever knew of the omitted laboratory report.[3] Further, reading the majority opinion one has the

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[3] Several days before submitting his written report to O'Sulllivan, Koch met with O'Sullivan and told him that the fire appeared to be caused by arson. Koch testified that O'Sullivan immediately became "defensive" and emphasized to Koch that arson was difficult to prove. XV R. 1279-80. O'Sullivan admitted that he refused to see Koch or return Koch's calls after reading Koch's report because "I wasn't at all comfortable with [Koch's] decision and I wanted to see the reports of the other fire investigators before I talked to him." XVI R. 1614.

idea that no evidence supported Koch's conclusion that arson caused the fire, and that he reached this conclusion solely to induce O'Sullivan to bring arson charges against the child victim's parents. But Koch's report indicated that he based his arson conclusion on his assessment that the fire started at four different places in the house simultaneously. See II R. Exhibit 1 at 3. The report also explained why Koch discounted all accidental or natural causes. Id. at 4.[4] The majority makes much of the

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[4] At the trial Koch testified in detail about the factors that led him to conclude the fire was arson. See XIV R. 1171-91; XV R. 1195-1251. Koch said he did not mention the broken gas valve in his report because he had discounted it as a possible source of the fire for several reasons. First, the evidence led Koch to conclude that the gas valve was broken as a result of the fire and was not a cause of the fire. The residents of the house did not smell gas leaking as they would have had the gas valve been broken before the fire.

fact that Koch changed his mind from a preliminary view that the fire was accidental. The majority, however, ignores Koch's explanation that his apparent change in position resulted from evidence arising during the investigation sufficient to outweigh his initial presumption that the fire was accidental in origin.[5] In light of

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XIV R. 1180. Second, there was no ignition source near the place where the gas valve was broken. Id. Koch did mention in his report that "[g]as was indeed a fuel after the roof collapsed prior to being shut off by firefighters; line severed when roof fell," II R., Exhibit 1 at 4, but O'Sullivan maintained that Koch's failure to include a laboratory report listing the gas valve as a potential fire source bordered on criminal conduct in falsely reporting a crime. XVI R. 1581-84.

[5] Koch testified that in investigating this fire he applied the general presumption for fire investigators going into a fire investigation--that "until proven otherwise, it's an accidental fire." XIV R. 1168; see also XV R. 1433 ("you don't want to claim arson until you're very sure. That is very detrimental to any

this sharp conflict in the evidence, it is most inappropriate for the appellate court to substitute its own judgment of the evidence for that of a jury which observed the witnesses directly.

Koch does not dispute that there was acrimony and divisiveness in the instant case. The questions here are why did it develop and why was Koch demoted? Was Koch demoted because his reasoning was faulty or dishonest, or because O'Sullivan did not want to hear the conclusion Koch was required by his job to make? In the face of the conflicting evidence in the record, this is a fact question that was properly

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investigation"). Also, Koch specifically denied falsifying the report or suppressing any evidence which conflicted with his conclusion that the fire was arson. XV R. 1324, 1342.

submitted to the jury and then was decided against the City. In my opinion, we must construe the jury's conclusion as one that Koch was demoted because of his expression of belief as to the cause of the fire.[6]

This appellate court has reweighed the evidence and found that the motivating factor in the detrimental employment

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[6] I would have preferred a more detailed special verdict form than was given here. Ideally, the court should have asked specifically whether Koch was demoted because of the content of his speech in the report. Asking only whether the report was a substantial or motivating factor in the demotion somewhat blurs the line between whether it was Koch's conclusion or how he arrived at the conclusion that made the difference. Nevertheless, the City did not object to the verdict form, and when considered together with the jury's conclusion that Koch would not have been demoted absent the speech, I think we must accept the verdict as a finding that Koch was demoted because the City used his conclusion of arson as an excuse to demote him.

decision was not Koch's speech. Whether there was substantial evidence to support the verdict is not an issue before us, either in the original panel decision or in the en banc rehearing. I think the speech was clearly on a matter of public concern, and Koch could not be demoted just because he stated his conclusion in a report required of him as employee. The issue before the jury was whether Koch was fired for his conclusion or for some other reason. We have no authority to overturn the jury's determination on that issue. Therefore, I dissent.

MARCH TERM - APRIL 29, 1987.

Before the Honorable William J. Holloway, Jr., Chief Judge, Honorable Oliver Seth, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha and Honorable Bobby R. Baldock, Circuit Judges.

THOMAS G. KOCH, Plaintiff-Appellant,	)	
vs.	)	NO. 83-2561
CITY OF HUTCHINSON: JOAN SCHRAG, Mayor of Hutchinson: BILL BORNHOLDT, City Commissioner of Hutchinson: RALPH GINGERICH, City Commissioner of Hutchinson: JOHN COREY, City Commissioner of Hutchinson; DAN ROBINSON, City Commissioner of Hutchinson; GEORGE PYLE, City Manager of HUTCHINSON; and DALLAS L. JONES, Fire Chief of Hutchinson. Defendants-Appellees	)	

This matter comes on for consideration

of appellees' petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the court grants rehearing en banc, limited to those issued discussed in Part VI of the majority opinion and in Judge Seth's dissent. The parties shall file simultaneous supplemental briefs addressing these issues on or before May 20, 1987. Each party may file a reply brief within 14 days of filing and service of opposing party's supplemental brief.

This case will be set for oral argument and submitted to the court en banc at an early date and the parties will be notified.

/S/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

PUBLISHED

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THOMAS G. KOCH, Plaintiff-Appellant	)	
vs.	)	No. 83-2561
CITY OF HUTCHINSON, et al., Defendant-Appellee	)	

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 79-1583)

Fred W. Phelps, Jr., of Phelps - Chartered, Topeka, Kansas for plaintiff-appellant.

Robert L. Howard, M. Kathleen Babcock, Loran J. Lemon of Foulston, Siefkin, Powers & Eberhardt, Wichita, Kansas, and Phillip H. Alexander, City Attorney, Hutchinson, Kansas for defendant-appellee.

Before LOGAN, SETH, Circuit Judges and KANE, District Judge*.

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*Honorable John L. Kane, Jr., United States District Judge for the District of Colorado, Sitting by designation.

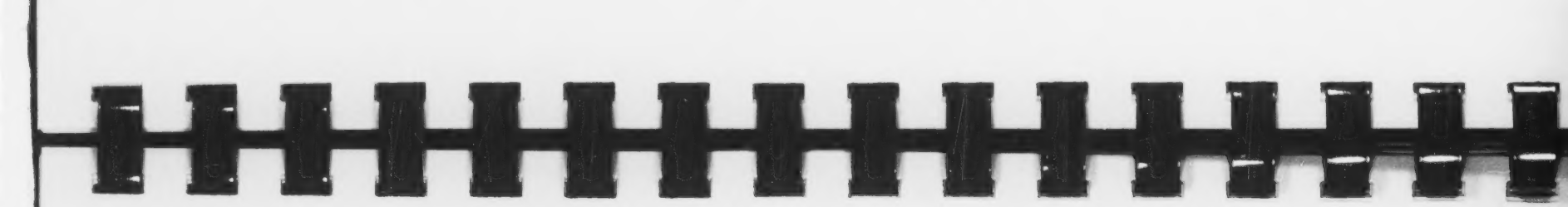
KANE, District Judge

Thomas G. Koch was awarded $100.000 by a jury on his claim that the City of Hutchinson, Kansas abridged his right of free speech as guaranteed by the First Amendment of the United States Constitution. The trial court then granted defendants' motion for judgment notwithstanding the verdict, set aside the verdict and entered judgment in favor of the City of Hutchinson. On appeal Koch raises a number of issues which he asserts requires reversal: (1) Whether the trial court erred in granting defendants' partial summary judgment on Koch's due process claims, finding such claims barred by res judicata; (2) Whether the trial court properly declined to instruct the jury on punitive damages; (3)

Whether the trial court erred by directing a verdict against Koch on his conspiracy claim under 42 U.S.C. Section 1985; (4) Whether the trial court erred by directing a verdict in favor of the individual City Commissioner - defendants; (5) Whether substantial evidence supports the jury verdict in favor of defendants Pyle and Jones; (6) Whether the trial court erred in granting defendant City of Hutchinson a judgment n.o.v. on the grounds that Koch's written opinion that a fire he investigated was caused by arson is not constitutionally protected; and (7) Whether the trial court erred in denying Koch's motion to reconsider, alter or amend. For the reasons set forth below, the judgments of the trial court are affirmed in part and reversed in part.

PROCEDURAL BACKGROUND

This action arose from events culminating in the demotion of plaintiff from Fire Marshal to Fire Prevention Inspector on July 23, 1979. On September 19, 1979, Koch filed a state court mandamus action, Koch v. Martindell, et al., No. 79 C 403, in the District Court of Reno County, Kansas. A bench trial was held on that case on June 23, 1980. A journal entry in that case was filed on August 28, 1980, finding against plaintiff on all counts. Koch appealed that judgment to the Court of Appeals of the State of Kansas. The Kansas Court of Appeals affirmed the state trial court's judgment in a Memorandum Opinion filed on November 5, 1981. Koch did not pursue an appeal to the Kansas Supreme Court.



Koch filed this civil rights action in the United States District Court for the District of Kansas alleging causes of action based upon the First Amendment, the Fourteenth Amendment, 42 U.S.C. Sections 1983, 1985, 1986 and 1988. Citing res judicata, the district court granted defendant's motion for partial summary judgment on plaintiff's procedural due process claim on May 11, 1983. A jury trial was commenced on August 15, 1983 and ended on September 2, 1983. At the close of the plaintiff's case, the district court granted a directed verdict in favor of the city commissioner defendants Schrag, Bornholdt, Gingerich, Corey and Robinson. The district court also directed a verdict in favor of defendants on Koch's conspiracy claim, 42 U.S.C. Sections 1985 and 1986. The jury

returned a special verdict accompanied by special interrogatories on September 2, 1983. The jury found defendants Pyle and Jones not liable. The jury found the City of Hutchinson liable for abridging Koch's First Amendment rights to freedom of speech.

On September 12, 1983, defendant City filed a motion for judgment notwithstanding the verdict. The court granted defendants' motion to set aside the verdict and entered judgment in favor of defendant city. Plaintiff filed his notice of appeal on November 28,1983.

FACTS

Thomas Koch was employed by the City of Hutchinson Fire Department for approximately 19 years. From November 2, 1976 until his demotion to Fire Prevention Inspector on July 23, 1979, Koch served as Fire Marshal.

As Fire Marshal, Koch's duties included supervision of fire prevention inspectors, responsibility to the fire chief, and investigation of all fires.

The City of Hutchinson is a municipal corporation of the first class, organized under the laws of Kansas. At all times pertinent to this suit, defendants Schrag, Bornholdt, Gingerich, Carry and Robinson were the City Commissioners. These defendants constituted the governing body of Hutchinson. Defendant Pyle was the City Manager, responsible for the entire administration of the City. Defendant Jones was the Fire Chief of the Hutchinson Fire Department.

On May 11, 1979, in execution of their official duties, Koch and two other inspectors investigated a house fire in

which a two year old girl burned to death. On May 24, 1979, Koch submitted his fire investigation report, concluding that the cause of the blaze was aggravated arson. This conclusion was contrary to Koch's preliminary statements to the effect that the fire was accidental. As well, the report omitted discussion of a May 22, 1979 General Laboratory's report that a cracked glass (sic, gas) valve, previously sent to General Laboratory by Koch, was a possible source of the fire.

Dissatisfied with Koch's report, County Attorney O'Sullivan - a non-party -sought written reports as to the fire's cause from the other two fire investigators. Both investigators opined the fire was an accident. On May 23, 1979, at the behest of O'Sullivan, Special Agent Maudlin of the

Kansas Bureau of Investigation also investigated the fire. With little cooperation from Koch, Special Agent Maudlin concluded there was no evidence upon which a finding of arson could be made.

On May 25, 1979, O'Sullivan, not Koch, released the contents of Koch's report to the press. "I had been contacted by a Hutchinson news reporter asking me about the investigation, and at that time, I told her about Koch's report and conclusion." On June 5, 1979, an article appeared in the Hutchinson paper saying "[A]ccording to reports released Tuesday morning by Reno County attorney Joe O'Sullivan, the official cause of the fire is listed as aggravated arson by Hutchinson fire marshal Tom Koch" Koch testified explicitly that he did not provide a copy of his report to the press.

A meeting was held on May 30, 1979 between O'Sullivan, Maudlin, Koch and Jones. A raging hostility developed between Koch and O'Sullivan. Shortly following this meeting the local media published the debate as to the fire's origin and the intragovernmental haggling.

Sometime after June 5, 1979, O'Sullivan first heard about the General Laboratory tests, known to Koch yet omitted from his report. O'Sullivan instigated a police investigation, borne out of animus and a belief that the omission constituted official misconduct. Investigating Detective Snell reported he had encountered hostility and belligerence from Koch.

Following this report, O'Sullivan turned the matter over to Fire Chief Jones. O'Sullivan wrote, in a July 13, 1979 letter

that he, the police, and the KBI had an absolute lack of confidence in Koch's ability to discharge his responsibilities as Fire Marshal. O'Sullivan further noted he would no longer rely on Koch's opinions as bases for criminal charges nor sponsor him as a witness.

On Monday, July 16, 1979, City Manager Pyle and Fire Chief Jones discussed the situation and decided to place Koch on a paid leave of absence pending further investigation - the "troubled employee's program". In the course of the investigation, Jones met with Koch to hear his side of the story. Upon conclusion of the investigation, Jones and Pyle met and determined because of the fire inspection report and its ramifications, demotion was called for. Koch was notified of such on

July 23, 1979. After the demotion, Koch took a substantial amount of sick leave due to an unrelated injury until he took disability retirement from the Fire Department on August 1, 1980.

I

WHETHER THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' PARTIAL MOTION FOR SUMMARY JUDGMENT ON KOCH'S DUE PROCESS CLAIMS, FINDING SUCH CLAIMS BARRED BY RES JUDICATA

In his complaint, Koch contends his demotion without a hearing was a violation of procedural due process as guaranteed by the Fourteenth Amendment. By a memorandum and order of May 11, 1983, the district court granted defendants' motion for partial summary judgment on Koch's procedural due

process claim. The district court pronounced the judgment of the state court collaterally estopped Koch from re-litigating this claim. A trial court's granting of a motion for summary judgment "may be affirmed if any proper grounds exist to support the ruling". Lindsey v. Dayton-Hudson Corp., 592 F.2d 1118, 1124 (1979), cert denied, 444 U.S. 856, 62 L.Ed 2d 75, 100 S.Ct. 116 (1979).

The state trial court found

> The plaintiff has no sufficient property interest in the rank of Fire Marshal so as to be entitled to a due process hearing.

Journal of Judgment, Koch v. Martindell, et al., No. 79 C 403, August 28, 1980. The federal trial court later found Koch

> was afforded a full and fair opportunity to litigate his procedural due process claims of a property interest in his position as Fire Marshal and of a

> liberty interest in good name and reputation in the community.

Memorandum and Order, May 11, 1983.

Res judicata encompasses two distinct doctrines, issue preclusion and claim preclusion.[1] For present purposes, issue preclusion prohibits the relitigation of facts and questions that were in issue in a previous action between the same parties, and which were actually litigated. See generally, 46 Am. Jur. 2d, Judgments Sections 414-429 (1969). Claim preclusion, on the other hand, prohibits a party from re-asserting a previously adjudicated cause

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[1]Courts have used various terms to describe these two doctrines. See, 46 Am.Jur. 2d, Judgments Section 397 (1969). Although modern usage normally refers to claim preclusion as res judicata and issue preclusion as collateral estoppel, we will use both terms, where possible, to avoid confusion.

of action. Claim preclusion, unlike issue preclusion, prohibits a party from asserting any matter that might have been asserted in the previous cause of action. See generally, Id., Sections 404-414.

28 U.S.C. Section 1738 directs as to give a Kansas state court judgment "the same full faith and credit...as [it has] by law or usage in the courts of [Kansas]. We must, therefore, determine what effect a Kansas state court would give to the previous judgment if it were hearing this case.[2]

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[2]Federal law and Kansas State law on collateral estoppel - issue preclusion are nearly identical. Compare annot. 58 L.Ed. 2d 938, Section 2(b) (1980) (federal collateral estoppel requirements) with Williams v. Evans, 220 Kan. 394, 552 P.2d 876 (1976). Accordingly, federal opinions reflect Kansas judicial authority on res judicata.

Here, whether Koch has a due process right to a hearing was actually litigated. The federal trial judge found whether Koch had a due process right to a hearing had actually been litigated in the state mandamus action and ensuing state appeal. This was proper. A collateral estoppel, or issue preclusion, analysis is therefore appropriate.

The Supreme Court of Kansas has stated that

> the doctrine of collateral estoppel prevents a second litigation of the same issues between the same parties or their privies even in connection with a different claim or cause of action.

Williams v. Evans, 220 Kan. 394, 552 P.2d 876, 878 (1976).

Contrary to plaintiff's argument, it does not matter that the state suit was in

the nature of mandamus, seeking injunctive relief, while the federal suit seeks damages. The issue of whether Koch had a property or liberty interest in not being demoted from Fire Marshal is synonymous in both cases. Issue preclusion does not require identity of causes of action. Id.; United States v. (sic, v.) Mendoza, 464 U.S. 154, 158, 78 L.Ed.2d 379, 383, 104 S.Ct. 568 (1984) ("Under the judicially developed doctrine of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation.")

A number of federal and Kansas decisions specifically hold issues litigated and determined in a mandamus proceeding may

not be relitigated in a subsequent suit for damages. Plummer v. Scott, 96 Kan. 390, 151 P. 1115, 1116 (1915); Brown v. DeLayo, 498 F.2d 1173, 1175 (10th Cir. 1974) ("A prior court adjudication of a federal constitutional right bars a subsequent federal action seeking vindication of the same right...the rule applies even though the federal action is brought under Sections 1981 and 1983. The Civil Rights Act is not a vehicle for collateral attack on a final state court judgment").

Koch is correct in stating a party being estopped must have had a "full and fair opportunity to litigate the particular issue". Blonder-Tongue Laboratories, Inc. v. University of Illinois, 402 U.S. 313, 328-29, 28 L.Ed.2d 788, 91 S.Ct. 1434, 1442-43, (1971). He is incorrect, however, in

asserting he was denied such an opportunity. We are not convinced that Koch was not allowed to present evidence and argue his cause. His appellate brief argued the evidence submitted at trial entitled him to a due process hearing; no denial of an opportunity to litigate the due process issue was even argued to the Kansas Court of Appeals. Koch fails to particularize his problems with the trial court's disposition of his procedural due process claim.

We cannot hold the federal trial court erred in precluding litigation of the due process issue. Summary judgment in the favor of defendants on plaintiff's procedural due process claim in affirmed.

II

WHETHER THE TRIAL COURT PROPERLY DECLINED TO INSTRUCT ON PUNITIVE

C-20

DAMAGES[3]

It is error for a trial judge to refuse a tendered instruction if it is supported by the evidence. Conversely, the refusal is justified if, in the court's judgment, the instruction is not warranted by the evidence. Lupton v. Turbey, 548 F.2d 316, 320 (10th Cir. 1977); 9 C. Wright & A. Miller, Federal Practice and Procedure, para. 2556 (1971).

Municipalities are necessarily immune to punitive damages. Newport v. Fast

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[3]Koch asserts that the punitive damages claim was dismissed, but the record fails to support this. Rather, it appears the district judge simply declined to instruct the jury on punitive damages. Normally, in order to preserve a failure to instruct for appeal, an objection has been made. However, because there is some confusion as to why the punitive damages claims never made it to the jury, this requirement is waived.

Concerts, Inc., 453 U.S. 247, 69 L.Ed. 2d 616, 101 S.Ct. 2748 (1981). The trial court was correct in not instructing on exemplary damages vis. a vis. the City.

With respect to the individually named defendants, punitive damages are available in a civil rights action only when

> the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.

Smith v. Wade, 461 U.S. 30, 56, 75 L.Ed 2d 632, 651, 103 S.Ct. 1625 (1983).

The facts show Jones and Pyle conducted a good faith investigation before demoting Koch. The special jury verdict that Pyle and Jones acted in good faith supports this finding. The City Commissioners were not involved, nor had they the authority to be

involved, with Koch's demotion. As noted in greater depth below, the structure of the city government precluded the commissioners from participating in any conduct, much less any motivated by animus, with regard to Koch's demotion.

It was not error for the trial judge to refuse a punitive damages instruction.

III

WHETHER THE TRIAL COURT ERRED BY DIRECTING A VERDICT AGAINST KOCH ON HIS CONSPIRACY CLAIM, 42 U.S.C. SECTION 1985

This Circuit applies a standard that "a directed verdict is justified 'only if the proof is all one way or so overwhelmingly preponderant in favor of the movant as to permit no other rational conclusion.'" Kiner v. Northcutt, 424 F.2d 222, 223 (10th

Cir. 1970).[4] Koch has the burden of specifically demonstrating the clear errors in the findings of the trial court. Butler v. Hamilton, 542 F 2d 835, 838 (10th Cir. 1976). The trial court's findings are presumed to be correct.

42 U.S.C. (1985 prohibits two or more people from conspiring to deny a person equal protection of the law. However, it is abundantly clear that Koch must prove the conspiracy was race or class based.

> The language of requiring intent to deprive of equal protection or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based invidiously discriminatory animus behind the

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[4]We are aware of the language in Irving v. Dubuque Packing Co., 689 F.2d 170, 173 (10th Cir. 1982) which incorrectly cites Kiner and uses the term "clearly erroneous." We eschew such use, however, as it creates confusion and deviates from the standard correctly announced in Kiner.

> conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal employment rights secured by the law to all.

Griffin v. Breckenridge, 403 U.S. 88, 102, 29 L.Ed 2d 338, 348, 91 S.Ct. 1790 (1970); see also, United Brotherhood of Carpenters v. Scott, 463 U.S. 825, 77 L.Ed 1049, 103 S.Ct. 3352 (1983) and Wilhelm v. Continental Title Co., 720 F.2d 1173, 1175 (10th Cir. 1983), cert. denied, 465 U.S. 1103, 80 L.Ed 2d 131, 104 S.Ct. 1601 (1984).

Koch did not establish any race or class based "invidiously discriminatory animus" on the part of the defendants at trial. According, the trial court's directed verdict on the (1985 claim was correct.

IV

WHETHER THE TRIAL COURT ERRED BY

C-25

DIRECTING A VERDICT IN FAVOR OF THE INDIVIDUAL CITY COMMISSIONERS AT THE CLOSE OF KOCH'S CASE[5]

The federal district court directed a verdict in favor of city commissioner defendants Schrag, Bornholdt, Gingerich, Corey and Robinson at the close of plaintiff's case. Koch has failed to prove the directed verdict is erroneous. The city commissioners did not participate in Koch's demotion. Pursuant to (2-21 of the Hutchinson City Code, it is the city manager who "shall be responsible for the administration of all the affairs of the

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[5]Koch again mischaracterized judicial activity as a dismissal. Disposition of claims by the court in the course of a jury trial constitutes a directed verdict. Fed. R. Civ. P. 50 (a); see 9 C. Wright & A. Miller, Federal Practice and Procedure (2523 (1971).

city...(and) shall appoint and remove all heads of departments and all subordinate officers and employees of the city." It is not erroneous to hold, therefore, that no reasonable jury could find the city commissioners individually liable for any deprivation of rights.

Plaintiff asserts the basis for the direction of a verdict was the city commissioners qualified good faith immunity. The record does not support this contention. Assuming the city commissioners' qualified good faith immunity caused the directed verdict, plaintiff still has not established the directed verdict was erroneous.

In Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L.Ed 2d 396, 102 S.Ct. 2727, the Supreme Court held

> Government officials performing discretionary duties generally are

> shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Entitlement to Fourteenth Amendment constitutional due process in a demotion was not clearly established at the time of defendant's action. The state court ruling demotion impinges no property or liberty interest, the sine qua non of due process protection, evinces as much. Plaintiff's First Amendment claim is also not clearly established. The federal district court's judgment notwithstanding the verdict, and the close call this issue presents, indicate the murky nature of this claim's viability. Notwithstanding our conclusion that Koch's speech is protected as it relates to a matter of public concern, a reasonably

objective person would not necessarily have known demotion was clearly violative of First Amendment rights.

The directed verdict in favor of defendant city commissioners is affirmed.

V

WHETHER SUBSTANTIAL EVIDENCE SUPPORTED THE JURY VERDICT IN FAVOR OF DEFENDANTS JONES AND PYLE

The jury, in a special verdict, specifically found defendants not liable for the demotion of Koch in violation of 42 U.S.C. (1983. In White v. Conoco,Inc., 710 F 2d 1442, 1443 (10th Cir. 1983), we stated the rules for review of a jury verdict:

> We undertake our review of the evidence in the record in the light most favorable to the prevailing party...with the rules firmly in mind that the appellate court does not retry the facts and

> that the party seeking to set aside the jury verdict must demonstrate trial errors which constitute prejudicial error or that the verdict is not based on substantial evidence...Jury findings on sharply conflicting evidence are conclusively binding on appeal inasmuch as jurors are charged with the exclusive duty of assessing the credibility of witnesses and determining the weight to be given to their testimony.

Koch contends the verdict is not based on substantial evidence and is contrary to the evidence. However, for a litigant to receive appellate review of a jury verdict for want of sufficient evidence, he must first have moved for a directed verdict before submitting the issue to the jury. The record fails to disclose Koch has properly preserved the issue for appeal. In Brown v. Poland, 325 F.2d 984, 985-86 (10th Cir. 1963), we stated the applicable rule:

> Plaintiff asserts that no substantial evidence supports the verdict and that the verdict is against the weight of the evidence. He made no motion for a directed verdict in the trial court...Failure to move for a directed verdict bars appellate review of the sufficiency of the evidence.

See also, Holmes V. Wack, 464 F.2d 86, 89 (10th Cir. 1972).

According, the jury's verdict regarding the non-liability of Jones and Pyle is affirmed.

VI

WHETHER THE TRIAL COURT ERRED IN GRANTING DEFENDANT CITY OF HUTCHINSON'S JUDGMENT n.o.v. ON GROUND THAT KOCH'S FIRE INVESTIGATION REPORT WAS NOT PROTECTED SPEECH

"The issue" the trial court noted in granting city defendant's motion for judgment notwithstanding the verdict, "...is whether plaintiff's opinion prepared in the course of his duties as fire marshal is protected speech under the First and Fourteenth Amendments". In this context the district court concluded, as a matter of law under Connick v. Myers, 461 U.S. 138, 75 L.Ed 2d 708, 103 S.Ct. 1684 (1983), that the "speech involved in this case cannot be fairly characterized as relating to a matter of "public concern" (sic, 'public concern') and therefore...is not protected under the First and Fourteenth Amendments". Memorandum and Order, October 18, 1983, p.3. It is not disputed Connick provides if speech cannot be characterized as constituting speech on a matter of public

concern, it is unnecessary for the court to scrutinize the reason for the ensuing discharge.

When a constitutional right is at issue our decision is not informed by a clearly erroneous standard. "[T]he inquiry into the protected status of speech is one of law, not fact", Connick, 75 L.Ed 2d at 720, n. 7, so "we cannot avoid making an independent constitutional judgment on the facts of the case". Id., 75 L.Ed 2d at 72, n. 10. In reviewing a judgment n.o.v. the evidence must be considered in "the light most favorable to the party against whom the motion is made", Moskowitz v. Peariso, 458 F.2d 240, 244 (6th Cir. 1972), "this being the point of view which was accepted by the jury". Serratoni v. Chesapeake and Ohio

Railway Company, 333 F.2d 621, 626 (6th Cir. 1964).

In Wilson v. City of Littleton, Colo., 732 F.2d 765 (10th Cir. 1984), we stated in determining whether a public employee's First Amendment rights were violated the court must (1) consider whether the employee's speech related to a matter of public concern, and (2) balance the interests of a public employee, as a citizen, in commenting upon matters of public concern against the interests of the public entity, as an employer, in promoting efficiency of the public services it performs , (the Pickering test).

We hold that Koch's speech is constitutionally protected under Connick v. Myers. "Whether an employee's speech addresses a matter of public concern," the

Supreme Court held, " must be determined by the content, form and context of a given statement, as revealed by the whole record." Id., 75 L.Ed at 720[5. (sic, 6)] This case is

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[5]Defendants erroneously argue we should consider plaintiff's internal arson investigation report in a vacuum, without regard to the media publicity nor "plaintiff's oral remonstrations during the applicable period." Defendants' brief at p. 35. This would contravene the Supreme Court's mandate that the "content, form, and context" be addressed. In this light, it has been noted that "the court's focus on "context" (sic, 'context') leads to the conclusion that an ... issue already in the public realm is ipso facto of public concern. If the employee "speaks" (sic, 'speaks') in the public or if her speech relates to an issue "in the news," (sic, 'in the news,') the speech deserves protection." Note, Rights of Public Employees, 97 Harv.L.Rev. 164, 171-2 (1983). In Connick, the majority distinguished the facts before it from Mt. Healthy City School Dist. Board of Education v. Doyle, 429 U.S. 274, 50 L.Ed.2d 471, 97 S.Ct. 568 (1977) in part because the latter involved media publication of plaintiff's statements. This media publication was a "context" factor in the Mt. Healthy court's determination that the public concern was implicated. See, Note, 97 Harv.L.Rev. at 171 n. 6464. In

analogous to Pickering v. Board of Education, 391 U.S. 563, 20 L.Ed 2d 811, 88 S.Ct. 1731 (1968). In that case the court held impermissible under the First Amendment the dismissal of a high school teacher for openly criticizing the Board of Education on its allocation of school funds between athletics and education and its methods of informing taxpayers about the need for additional revenue. Pickering's subject was "a matter of legitimate public concern (upon which) free and open debate is vital to informed decision making by the electorate". Connick, 75 L.Ed 2d at 719.

It is only "when employee expression cannot be fairly considered as relating to

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this case the city's internal "arson debate" had been made public by the county attorney, O'Sullivan, before Koch's demotion.

any matter of political, social or other concern to the community", Id., that the employee is without First Amendment protection. There is no First Amendment protection where the "public employee speaks...as an employee upon matters only of personal interest". Id., 75 L.Ed 2d at 720.

"Public concern" in Connick v. Myers, 103 S.Ct. 1684 (1983), turned on the content of the speech in question. The Court distinguished "matters of public concern" from "matters of personal interest." Id. at 1690. In the instant case, Koch's report was not simply an internal memorandum intended for O'Sullivan's eyes only. O'Sullivan, not Koch, disclosed the content of Koch's report to the press the day after Koch had submitted it, and released the

written report itself to the press the following week. Moreover, under Kansas law, it was foreseeable that Koch's report would have a public audience. Kansas law mandates that investigative reports "be filed in the office of the state fire marshal," Kan. Stat. Ann. (31-137, and Kan. Stat. Ann. (45-210 explicitly gives the public access to such records. Such "sunshine" acts are persuasive legislative determinations that the content of Koch's report was of public concern, ultimately intended for a public audience.

It is clear the speech presently at issue involves a matter of public concern and is readily distinguishable from Connick on its facts. Connick involved the dismissal from employment of Shelia Myers, an assistant district attorney in New

Orleans. Upon learning she was being transferred, Myers circulated a questionnaire among her co-workers soliciting their views on office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors and whether employees felt pressure to work on political campaigns. Only this latter query touched upon matters of public concern, but is irrelevant for present purposes.

The Supreme Court noted that Myers' questions were calculated solely to "gather ammunition for another round of controversy with her supervisor...reflect(ive of) one employee's dissatisfaction with a transfer". Id. 720 L.Ed 2d at 721. The survey questions in Connick were motivated by anger

with the object of personal aggrandizement and

> did not seek to inform the public that the District Attorney's office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases. Nor did Myers seek to bring to light actual or potential wrong doing or breach of public trust on the part of Connick and others.

Id.

On the contrary, the speech in the present case was calculated to inform and alert the public about the city government's discharge of its duty to investigate arson. Unlike internal transfer procedures at issue in Connick, the content of Koch's speech is of public import in evaluating the performance of the City of Hutchinson's elected officials. Unlike Connick, the speech at issue was not motivated by

personal interest. Koch's objective was to inform his superiors of what he believed to be arson and then the public of what he believed was defendants' misfeasance.

This case is more like Pickering where public comments about the allocation of school funds was determined to be a matter of public concern. How the school board discharges its duty to educate children is akin to how the city and its fire department investigates arson. The Pickering and present speeches both, unlike Connick's, "sufficiently inform the issue (of education or arson investigation) as to be helpful to the public in evaluating the conduct of the government". Wilson, 732 F.2d at 768. We hold, therefore, that the speech at issue here was of public concern so as to render

the district court's granting of defendant's motion for judgment n.o.v. erroneous.[7]

Accordingly, the judgment of the trial court with respect to the judgment n.o.v. is reversed. The jury's verdict is

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[7] Defendants assert in the event we find Koch's speech a protected matter of public concern, we must then determine whether the trial court's action can be sustained under the second portion of the Wilson v. City of Littleton analysis, i.e., the application of the Pickering test. This test is a "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees". Pickering, 391 U.S. at 568, 20 L.Ed 2d at 817.

We disagree. The jury below has already determined the City of Hutchinson is liable under { 1983 for violation of Koch's First Amendment rights. The sole issue addressed by the trial judge in granting judgment n.o.v. was whether the speech was a matter of public concern. Whether the jury properly performed the Pickering balancing test in reaching its verdict is not now before us.

reinstated.[8] The trial court's rulings are affirmed in all other respects.

83-2561 - THOMAS G. KOCH v. CITY OF HUTCHINSON, et al.

SETH, Circuit Judge, dissenting:

Regretfully, I must dissent from the majority position.

The issue on this portion of the appeal relates only to the official written report submitted by Mr. Koch as to the cause of the fire and the grant of judgment n.o.v. by the trial court on the First Amendment issue. This was a report required to be submitted as one of his duties as fire marshal. He and two inspectors made the investigation.

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[8] Because we hold that the judgment n.o.v. was improper and reinstate the jury verdict, whether it was error to deny plaintiff's motion to reconsider, alter or amend is denied as moot

The plaintiff Koch in his report concluded that the fire was caused by arson. It is on this report alone that the plaintiff relies as protected speech.

At the time the official report was submitted no official position had been taken by the plaintiff's superiors as to the cause of the fire. There was no issue, no dispute as to the fire. The report was not critical of any policies in effect at the time nor of the performance of duties by any city employees or officials. The report was in the exercise of a narrow affirmative duty placed on the plaintiff to investigate and make a report on the cause of fires. His immediate superior was the fire chief. It was thus an isolated and independent exercise of plaintiff's duties and not part of any ongoing problem or issue. It

represented plaintiff's official conclusion as to the cause of this fire and nothing more. The record does not in any way indicate that plaintiff intended the report to be anything other than the ordinary exercise of his routine duties within the fire department although the matter was serious.

Common understanding tells us that plaintiff was doing what the multitude of city employees in Kansas were doing that same day--submitting reports and statements as to their activities, conclusions, and opinions in the performance of their duties. Each was of a greater or lesser significance, but each was part of the fuel for the machinery of government and each had an impact on the public and was of interest to the taxpayers and the public generally.

It would be expected by common knowledge that each submission would become public knowledge by reason of its nature, or by its impact on individuals or groups or by reason of the sunshine laws. The fact that the reports would become generally known seems to be present in every instance such as this and does not serve to help us reach a conclusion.

~~Public knowledge or public~~ airing of a statement such as this does not of itself make it of "public concern" as the term is used in Connick v. Myers, 461 U.S. 138. Whether the statement was made public, how it was made public, who made it public, or the extent of the publicity would not seem to be significant. Key v. Rutherford, 645 F.2d 880 (10th Cir.) As the Court said in

Givhan v. Western Line Consolidated School District, 439 U.S. 410:

> "The First Amendment forbids abridgment of the 'freedom of speech.' Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public. We decline to adopt such a view of the First Amendment."

Connick tell us that the "nature of the employee's expression" is the significant factor. This is a question of subject matter and context as the Court there states. This is the issue before us.

If any and every official report by a public employee regardless of its "nature" became a matter of "public concern" because it received publicity there would be no room for expression of opinion or "give and take" in the conduct of the public business, as we

said in Schmidt v. Fremont County School District No. 25, 558 F.2d 982 (10th Cir.). Also as the Court said in Connick, "government offices could not function if every employment decision became a constitutional matter."

What was the "nature of the employee's expression" in the case before us? The record shows, as already described, that the report by plaintiff was a statement of his conclusions as a public employee limited to a matter within his official duties. The Court in Connick makes a reference to Pickering v. Board of Education, 391 U.S. 563, as follows:

> "The repeated emphasis in Pickering on the right of a public employee 'as a citizen, in commenting upon matters of public concern,' was not accidental. This language, reiterated in all of Pickering's progeny,' reflects both the historical evolvement of

> the rights of public employees, and the common-sense realization that government offices could not function if every employment decision became a constitutional matter."

The Court in the same opinion thereafter said:

> "We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. Cf. Bishop v. Wood, [426 U.S. 341,] at 349-350. Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does no require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State."

The basic consideration by the Court in Connick was the fact that the "speech" arose

from and concerned the refusal by plaintiff to accept a transfer and the office dispute as to her position. this was the "personal interest" referred to by the Court. When the statement is placed in the "personal interest" category it is neither of "public concern" nor is it advanced by the employee "as a citizen." It thus fails on both requirements set forth in Pickering and emphasized in Connick. We have considered several personal interest cases. Saye v. St. Vrain Valley School District RE-1J, 785 F.2d 862 (10th Cir.); Bailey v. Kirk, 777 F.2d 567 (10th Cir.); Sipes v. United States, 744 F.2d 1418 (10th Cir.), and Wilson v. City of Littleton, Colo., 732 F.2d 765 (10th Cir.), wherein the requirements of Pickering were not met.

There is, of course, no personal interest element in the case before us, but there exists a equally evident failure to meet the Pickering-Connick requirements. This is the fact that the report here concerned was not made by the plaintiff "as a citizen commenting . . . . " It was instead made by the employee solely in his official capacity. Thus, in my view, the report did not invoke First Amendment protection.

In Schmidt v. Fremont County School District No. 25, 558 F.2d 982 (10th Cir.), we also considered a statement of general interest by a school principal which we described as a "part of his official functions" and thus did not invoke First Amendment protection. We there said in part:

> "Furthermore, to hold otherwise would preclude discussion between a school board and its employees on the formulation and administration of matters of policy in the school system. A give and take is expected in discussions as to internal issues."

See also Wilson v. City of Littleton, Colo., 732 F.2d 765 (10th Cir.).

Thus the report here considered is well within our holding in Schmidt. It is purely an official statement, presented as such, and plaintiff was "speaking" only as a public employee and not as a citizen. This does not meet the requirements set forth in Pickering and Connick.

I would thus affirm the trial court.

D-1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

THOMAS G. KOCH, Plaintiff,	)	
Vs.	)	Civil No. 79-1583
CITY OF HUTCHINSON, et al., Defendants.	)	

ORDER

This case is before the court on the motion of plaintiff to reconsider, modify, alter or amend the judgment of the court filed October 19, 1983 granting defendants motion for judgment notwithstanding the verdict. After due consideration of plaintiff's memorandum of law in support of its motion, the court declines to alter or amend its finding that plaintiff's speech is not protected speech under the First and Fourteenth Amendments to the United States

Constitution.

IT IS THEREFORE ORDERED that plaintiff's motion to amend or alter judgment is overruled.

DATED this 2nd day of November, 1983, at Wichita, Kansas.

S/S Sam A. Crow
Sam A. Crow
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

THOMAS G. KOCH Plaintiff	)	
Vs.	)	No. 79 1583
CITY OF HUTCHINSON, et al Defendant	)	

MEMORANDUM AND ORDER

This case is before the court on the motion of the City of Hutchinson for judgment notwithstanding the verdict pursuant to Rule 50(b), Fed.R.Civ.P. In considering a judgment notwithstanding the verdict, the court may not weigh the evidence, pass on the credibility of witnesses or substitute its judgment of the facts for that of the jury. E.g., Miller v. City of Mission, 516 F.Supp. 1333 (D.Kan. 1981). The court must view the evidence most favorably to the plaintiff and give

plaintiff the benefit of all reasonable inferences from the facts. C. Wright & A. Miller, Federal Practice and Proceudre: (sic Procedure) Civil 2d (2524 (1971)

Plaintiff was demoted from fire marshal to fire prevention inspector for the City of Hutchinson because of his written opinion that a residential fire which he investigated was an aggravated arson fire. The fire resulted in the death of an infant. The opinion was included in a fire investigation report prepared in the course of plaintiff's official duties to investigate and to determine the origin of the fire. The fire investigation report was delivered by plaintiff to the county attorney for his use in connection with investigatory and prosecutorial responsibilities in the case. The county

attorney subsequently notified plaintiff's superior, the fire marshal, that he could no longer sponsor the plaintiff as a credible witness in court. After an internal investigation the fire chief and the city manager demoted plaintiff. The jury found that plaintiff was demoted because of his opinion that the fire was aggravated arson, and further found that plaintiff would not have been demoted in the absence of the opinion.

At the close of plaintiff's evidence, defendants moved for a directed verdict, contending, in part, that the opinion of the fire marshal was not speech protected by the First and Fourteenth Amendments to the United States Constitution. The motion for directed verdict was overruled. On motion for judgment notwithstanding the verdict,

the City of Hutchinson renews its challenge that the opinion given by plaintiff in connection with his fire investigation report was not protected speech. The issue before the court is whether plaintiff's opinion prepared in the course of his duties as fire marshal is protected speech under the First and Fourteenth Amendments.

The inquiry into the protected status of speech is one of law and not one of fact. Connick v. Myers, _____ U. S. _____, 75 L.Ed.2d 708, 720 n.7 (1983). If the court determines that the speech cannot be characterized as speech on a matter of public concern, then it is unnecessary to scrutinize the reasons for the discharge. Id. at _____, 75 L.Ed.2d at 719. Whether a public employee's speech addresses a matter of public concern must be determined by the

content, form and context of the statement as revealed by the whole record. Id. at _ __, 75 L.Ed.2d at 720.

After due consideration of the arguments and authorities of counsel, and of the record, the court is of the opinion that the speech involved in this case cannot fairly be characterized as relating to a matter of "public concern" and therefore the speech is not protected under the First and Fourteenth Amendments. As the Supreme Court cautions in Connick, it cannot be presumed that all matters which transpire within a government office are of public concern since virtually every utterance of a public employee would plant the seed of a constitutional case. Id. at ____, 75 L.Ed. 2d 721. While an opinion concerning the origin of a fire which resulted in a

fatality is certainly of general interest in the community, the functions of investigation and prosecution are governmental functions within the expertise of the offices charged with those responsibilities. Absent a colorable allegation of wrongdoing, these functions cannot be furthered by being thrust into the arena of public debate.

The plaintiff's report and opinion was an internal statement intended to provide a basis for further action, either investigatory or prosecutorial. As such, the statement was an intragovernmental communication within the scope of plaintiff's official duties and does not invoke First Amendment protection. Schmidt v. Fremont County School District, 558 F.2d 982, 984-85 (10th Cir. 1977). In issuing

the report and opinion, plaintiff was not commenting as a citizen upon a matter of public concern, but rather as an employee issuing an internal report in the course of his official duties. The government as an employer has a greater interest in regulating the speech of employees than in regulating the speech of the private citizen. The plaintiff had no personal interest in expressing his opinion, rather the government created the forum for the speech and is primarily interested in its use. The plaintiff's opinion was not intended as a vehicle for informing public debate, nor did plaintiff seek to criticize the government. Accordingly, we cannot find that plaintiff's speech was protected by the First Amendment. It follows that plaintiff's demotion does not raise a jury

issue with regard to defendants' conduct in demoting plaintiff.

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statue or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable. (citations omitted).

Connick v. Myers, _____ U.S. _____, 75 L.Ed.2d 708, 719-20 (1983)

The court has not been asked to decide, nor does it decide, for the purposes of defendant's motion, whether the acts of the individual defendants constituted an official policy or custom of the City of

Hutchinson so as to subject the City of liability under 42 U.S.C. (1983.

IT IS THEREFORE ORDERED that defendant's motion for judgment notwithstanding the verdict is sustained. The judgment entered in favor of plaintiff against the City of Hutchinson is hereby set aside. The clerk is directed to enter judgment in favor of City of Hutchinson.

Dated this 18th day of October, 1983, at Wichita, Kansas.

/S/ Sam A. Crow
Sam A. Crow
U. S. District Judge

F-1

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

THOMAS G. KOCH	)	
	)	
Plaintiff	)	
Vs.	)	No. 79 1583
	)	
CITY OF HUTCHINSON, GEORGE PYLE, City Manager of Hutchinson DALLAS L. JONES Fire Chief of Hutchinson	)	
	)	
Defendants	)	

SPECIAL VERDICT

We, the jury, submit the following answers to the questions submitted by the court:

1. Has the plaintiff proven that the protected portion of the May 24, 1979, Fire Investigation Report was the substantial or motivating factor for his demotion from Fire Marshall to Fire Prevention Inspector?

Yes __X__ No_____

If the answer to question (1) is Yes then proceed to question (2). If the answer to question (1) is No then your deliberations are completed and you should proceed no further.

2. Have the defendants proven that plaintiff would have been demoted if the protected portion of the May 24, 1979, Report had not been present?

Yes _____ No X

If the answer to question (2) is Yes then your deliberations are complete and you should proceed no further. If you answer to question (2) is No then you should answer questions (3) through (5)

3. Who is liable for the demotion of plaintiff in violation of 42 U.S.C. (1983?

City of Hutchinson Yes X No _____

George Pyle Yes _____ No X

Dallas L. Jones Yes _____ No __X__

4. Have defendants proven that their act of demoting plaintiff was reasonable and in good faith under all of the circumstances then existing?

George Pyle Yes __X__ No _____

Dallas L. Jones Yes __X__ No _____

5. What amount of actual damages should be awarded plaintiff for his demotion?

$ 100,000

9/2-83
Date

/S/ Jan R. Lentell
Foreperson

Supreme Court, U.S.
FILED
SEP 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-368

In The

Supreme Court of the United States

October Term, 1988

THOMAS G. KOCH,

Petitioner,

vs.

THE CITY OF HUTCHINSON, KANSAS, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in concluding that petitioner's "speech" was unprotected under the balancing test of *Pickering v. Board of Education*, 391 U.S. 563 (1968)?

   (A) Should the Court of Appeals have avoided *Pickering* balancing altogether, on the theory that respondents waived the issue by not citing *Pickering* to the trial court until their motion for judgment notwithstanding the verdict?

   (B) Should the Court of Appeals have avoided *Pickering* balancing altogether, on the theory that respondents ought not have been allowed to invoke *Pickering* unless they admitted at trial that petitioner's "speech" was a substantial or motivating factor in petitioner's demotion?

   (C) Did the Court of Appeals err in striking the *Pickering* balance in respondents' favor by (i) misreading the facts, or reading them inconsistently with the jury verdict; (ii) giving conclusive weight, or excessive weight, to the fact that petitioner's "speech" was made in an internal report that it was petitioner's job to make; or (iii) evaluating petitioner's "speech" in factual context rather than determining whether that "speech" was inherently disruptive in the abstract?

2. Did the Court of Appeals err in concluding that petitioner's "speech" was not on a matter of public concern within the meaning of *Connick v. Myers*, 461 U.S. 138 (1983)?

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No. 88-368

In The

Supreme Court of the United States

October Term, 1988

THOMAS G. KOCH,

Petitioner,

vs.

THE CITY OF HUTCHINSON, KANSAS, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents[1] respectfully request that this Court deny the petition for writ of certiorari, which seeks review of the en banc opinion of the Court of Appeals for

1. Respondents are the City of Hutchinson, Kansas; Joan Schrag, Mayor; Bill Bornholdt, Ralph Gingrich, John Corey, and Dan Robinson, City Commissioners; George Pyle, City Manager; and Dallas Jones, Fire Chief. Only the City has an interest in the questions presented in the petition; petitioner's claims against the other respondents were disposed of below for reasons not disputed in the petition.

the Tenth Circuit, reported at 847 F.2d 1436 (1988) (the Court of Appeals' earlier decisions in the case are reported at 847 F.2d 1435 (1987) and at 814 F.2d 1489 (1987)).

STATEMENT OF THE CASE[2]

This lawsuit arose from mid-1979 events that culminated in petitioner's demotion from Fire Marshal to Fire Inspector for respondent City of Hutchinson. The events leading to the demotion began with a written report prepared by petitioner in the ordinary course of his job and submitted to Reno County Attorney Joseph O'Sullivan. Petitioner's report concluded that a house fire, in which an unattended small child burned to death, was the result of arson. The ultimate issue presented by the petition for certiorari is whether petitioner's report was protected by the First Amendment so that it could not lawfully be a basis for his demotion.

The decision to demote petitioner, which the jury in this case expressly found to be "reasonable" and in subjective[3] "good faith," was made by Respondents Dallas

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2. Unless other citations are given, all facts set out in this brief appear, with specific citation to the record on appeal, in the Court of Appeals' factual summary, 847 F.2d at 1437-39.

3. In the instructions to the jury, "good faith" was defined, entirely in subjective terms, as requiring belief in the propriety of one's actions, the absence of malicious intent, and the absence of knowledge that one's actions constitute a constitutional wrong. *See* Instruction No. 16, Appeal Appendix Vol. I, p. 196.

Jones, the City Fire Chief, and George Pyle, the City Manager. Their decision, which relieved petitioner of any official contact with the County Attorney (a non-party who had no role in the City's governance but was, rather, an elected official of the State of Kansas)[4] followed a letter of complaint about petitioner from the County Attorney. In the letter, the County Attorney accused petitioner of deliberately falsifying the fire investigation report, and concluded:

> The net result is a total lack of confidence in [petitioner's] opinion and in his ability to rationally and professionally conduct an investigation. This lack of confidence is not only on my part but is shared with me by the police detectives and the local K[ansas] B[ureau of] I[nvestigation] agent. On the other hand and to the contrary we have total confidence in the other arson investigators in your department, and that not only are they pleasant and cooperative to work with but their conclusions appear based in fact and reason. On behalf of the Reno County Attorney's Office and as long as I hold this position, I will not accept a report from [petitioner] as the basis of a criminal charge nor do I feel that I could ever call him as a State's witness and sponsor him as credible and reliable.

Petitioner and two of his subordinate fire inspectors began their investigation of the fatal house fire on May 11, 1979. All three investigators initially opined that the fire was an accident. Roughly a week later, however, petitioner heard that since the relevant statute had been declared unconstitutional, the County Attorney would

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4. *See* Kan. Stat. Ann. §§ 19-701 to -704. The bulk of a County Attorney's job involves criminal prosecutions in Kansas state district courts. *See id.* § 19-703.

not charge the dead child's parents with criminal endangerment, and that only if arson were involved might the parents be brought to task. Another week later, in petitioner's written report to the County Attorney, he concluded that the fire had been caused by arson. Petitioner's report does not mention that a laboratory report had suggested a cracked gas valve as a possible source of the fire, that an electrical inspector had found the house to have oversized fuses and poor wiring, or that petitioner's two subordinates adhered to their initial conclusion that the fire was accidental. Nonetheless, petitioner, in advancing his arson conclusion, purported to have eliminated all possible accidental causes of the fire.

County Attorney O'Sullivan testified that he was suspicious of petitioner's report because he had heard that the other two fire investigators still believed that the fire was accidental, and because he "felt that [petitioner] had changed his mind regarding the cause of the fire after he found out the parents couldn't be charged with endangering a child," although notwithstanding his suspicions he released petitioner's report and its conclusion to the press. *See* 814 F.2d at 1492. The other two fire investigators testified that they shared the County Attorney's suspicions of petitioner's changed opinion about the fire's cause. The County Attorney also recruited a Kansas Bureau of Investigation agent to investigate the fire. That agent reported to the County Attorney that there was no basis for concluding that the fire had been deliberately set. He also reported that he had received little cooperation from petitioner, who deeply resented that his conclusion was not being taken as gospel and that credence was

being given to the contrary conclusions of his subordinates.

On May 30, 1979, County Attorney O'Sullivan, the K.B.I. agent, petitioner, Fire Chief Jones, and a police detective met to discuss the situation, and open hostility was evident between petitioner and the County Attorney; petitioner was belligerent and uncooperative, according to everyone else at the meeting.[5] A few days later, the local newspaper published a story based on the information earlier given them by the County Attorney. *See* 814 F.2d at 1492.

Shortly thereafter County Attorney O'Sullivan learned about the laboratory tests which suggested a defective gas valve as a possible source of the fire, but which petitioner had omitted from his report. He requested a police investigation into petitioner's conduct. The investigating policeman received little cooperation from petitioner, who was upset and irate during their interview: petitioner told the detective that he did not have to explain or defend his report to anyone. After receiving the detective's report, the County Attorney sent the letter to Chief Jones in which he accused petitioner of deliberately falsifying his report and vowed never to accept a report from petitioner nor to sponsor petitioner as a witness.

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5. The Court of Appeals panel whose ruling in petitioner's favor was overturned en banc declared that there was a "raging hostility" between O'Sullivan and petitioner. 814 F.2d at 1492.

After receiving the letter from the County Attorney, Fire Chief Jones met with City Manager Pyle in mid-July, 1979, to discuss the accusations against petitioner. They decided to put petitioner on paid leave of absence until the matter could be investigated; Chief Jones then conducted an inquiry, including an extensive discussion with petitioner about petitioner's view of events. *See* Appeal Appendix, Vol. II, pp. 540-566 (transcript of taped discussion between Fire Chief Jones and petitioner). When the investigation was completed, the Fire Chief and City Manager decided to demote petitioner to a Fire Inspector position that would not involve participation in fire investigations.

Fire Chief Jones announced the demotion to petitioner in a July 23, 1979, letter that lists six reasons for the demotion: (1) petitioner's uncooperative and belligerent behavior toward other agencies investigating the fire; (2) petitioner's failure to make important information available to the other investigators; (3) the destruction of necessary working relationships caused by petitioner's behavior; (4) petitioner's failure to comply with Chief Jones's order to stay away from the subordinate Fire Inspectors until they had finished writing their reports for the County Attorney; (5) petitioner's deliberate refusal to cooperate with the County Attorney, despite repeated direction from Chief Jones that he cooperate; and (6) unspecified "unacceptable behavior you have demonstrated in the past." *See* Appeal Appendix, Vol. II, pp. 538-39. The jury's finding, by special verdict, that Fire Chief Jones and City Manager Pyle acted reasonably and in subjective good faith forecloses the possibility that the jury's verdict was based on the view that the Fire Chief or

City Manager believed the reasons given in Chief Jones's letter to be false.

After petitioner's demotion, local newspaper stories chronicled the demotion and preceding events, and petitioner contested the demotion in a state court mandamus action, which included a due process claim. Petitioner lost the state court action, and lost again on appeal. In the meantime, he had filed the present case against respondents in the United States District Court for the District of Kansas, alleging that his demotion violated his First, Fifth, Ninth, and Fourteenth Amendment rights and 42 U.S.C. §§ 1983, 1985, 1986 and 1988. In pretrial rulings and in a partial directed verdict at the close of petitioner's evidence, the District Court disposed of all petitioner's claims except his First Amendment claims against the City, Fire Chief Jones, and City Manager Pyle. These decisions were affirmed by the Court of Appeals, 814 F.2d 1489 (1987), were not reheard en banc, and are not questioned in the petition for certiorari.

In their trial brief filed in the District Court, respondents argued that petitioner's "speech" was unprotected under the "public concern" test of *Connick v. Myers*, 461 U.S. 138 (1982), and also under the "balancing test" of *Pickering v. Board of Education*, 391 U.S. 563 (1968). *See* Trial Brief of Defendants, District Court Docket No. 68, filed August 10, 1979, at pp. 9-18. Respondents accordingly moved at the close of petitioner's evidence, and again at the close of all the evidence, for a directed verdict on petitioner's First Amendment claims. The District Court denied respondents' First Amendment directed verdict motion, however, and instead instructed the jury that petitioner's written conclusion that the fire

was caused by arson was protected speech as a matter of law. The District Court also instructed, in accord with *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), that the City should be held liable if petitioner's protected "speech" was a "substantial" or "motivating" factor in his demotion, unless respondents proved they would have demoted him even had the protected "speech" never been made. Faced with those instructions, the jury found the City liable to petitioner on his First Amendment claims, but it found in favor of the City Manager and Fire Chief and, as mentioned above, found that the City Manager and Fire Chief had acted reasonably and in subjective good faith in demoting petitioner.

The City then timely moved for judgment notwithstanding the verdict, again arguing, *inter alia*, that petitioner's speech was unprotected under the First Amendment because it was not on a matter of "public concern" under *Connick* and because it failed the balancing test of *Pickering*. The District Court granted the City's motion, relying on *Connick* and on *Schmidt v. Fremont County School District No. 25*, 558 F.2d 982 (10th Cir. 1977).

On appeal, a divided panel of the Tenth Circuit Court of Appeals reversed the judgment n.o.v. and reinstated the jury verdict, but affirmed the District Court's other rulings. 814 F.2d 1489 (10th Cir. 1987). The panel majority held that petitioner's speech did relate to a matter of public concern under *Connick*, but declined to decide whether the speech was protected under the *Pickering* balancing test, because it erroneously believed that the jury had been given the task of *Pickering* balancing and erroneously believed that it ought not consider whether a rationale not expressly relied on by the District Court

might nonetheless justify its award of judgment n.o.v. to respondents.[6] *See id.* at 1498-99 & n. 7.

On rehearing en banc, the Tenth Circuit Court of Appeals, by a 6-2 vote, held that petitioner's "speech" was unprotected because it did not involve a matter of public concern within the meaning of *Connick*. *See* 847 F.2d 1436, 1443-49 (10th Cir. 1988). The en banc majority also held that petitioner's "speech" was unprotected under *Pickering* because the report in question reflected upon petitioner's competence and ability to perform his job and caused evident disruption of necessary working relationships between petitioner and others, and thus the City's interest in efficiently providing necessary services outweighed petitioner's limited interest in making his "speech." *Id.* at 1449-52.

REASONS WHY THE WRIT SHOULD BE DENIED

The Court of Appeals' Opinions, the Petition for Certiorari, and this Brief in Opposition discuss several

6. The panel majority's notion that it could not consider an alternative rationale not explicitly addressed below was, of course, at odds with the rule of *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924), which permits an appellee, "without taking a cross appeal, [to] urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." This "inveterate and certain" rule has been invoked by this Court on innumerable occasions. *See, e.g., Mass. Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479, 480 (1976) (per curiam).

more or less complex legal issues. The fundamental principle that underlies the Tenth Circuit Court of Appeals' en banc decision, however, was distilled into a single sentence in Judge Monroe McKay's concurring statement:

> The key in the difficult task of applying the general principles to the facts of this case lies in the fact that official reports cannot be immunized from competency judgments just because they involve subjects which are inherently dramatic and likely to attract public attention.

847 F.2d at 1453 (McKay, J., concurring). This is not a novel idea; nor is it in any way inconsistent with the First Amendment case law decided by this Court or in the other Circuits. Five years earlier, the en banc Seventh Circuit stated, in words that might have been designed for the instant case:

> [A] multitude of personnel decisions are of course properly based on what an employee says and how he says it. From the interview with an applicant for a position to discussions with the employee about the proper discharge of his duties, the content of an employee's speech naturally affects his superior's assessment of him and forms the basis of personnel decisions. In some sense even these kinds of communications–based on the substantive work to be performed–are matters of public interest, but making employment decisions based on such speech is plainly permissible. The state is simply acting in its capacity as an employer.

Egger v. Phillips, 710 F.2d 292, 316 (7th Cir.) (en banc), *cert. denied*, 464 U.S. 918 (1983). There is nothing unusual, remarkable, or aberrant about this intuitively obvious principle, which has been recognized in the decision that petitioner attacks, in *Egger*, in *Schmidt v. Fremont County*

School District No. 25, 558 F.2d 982 (10th Cir. 1977), and in many other cases.

Review on writ of certiorari is necessarily confined to those few cases where "special and important reasons" justify this court's intervention. Sup. Ct. R. 17. No useful purpose would be served by this Court's affirmance of the obvious point that the First Amendment does not immunize government employees against scrutiny of their job performance just because part of that performance, as in the written report in this case, may be expressed in "speech." Moreover, judged both by numbers of pages expended in the petition and in the petition's order of "Questions Presented," petitioner's major argument is not that the en banc Court of Appeals' legal analysis was faulty, but that it misread the factual record. Respondents will show *infra* that the Court of Appeals misread neither the facts nor the law. But the pride of place that petitioner gives to his assertions of factual errors, which are of necessity unique to his particular case, speaks volumes about the general significance of his legal arguments–arguments he himself regards as merely subsidiary.

I. Petitioner's Intragovernmental Report is Not Protected Speech Under the Balancing Test of Pickering v. Board of Education, 391 U.S. 563 (1968)

A. Respondents Have Not Waived the Pickering Issue

Petitioner argues that respondents waived any right to claim that petitioner's "speech" was unprotected under the balancing test of *Pickering v. Board of Education*, 391 U.S. 563 (1968), by failing to invoke *Pickering* before

the jury returned its verdict and by failing to concede at trial that petitioner was demoted because of his "speech." These waiver arguments are frivolous.

In the first place, petitioner's waiver arguments are raised for the first time in his Petition for Certiorari; he has thus waived his own waiver arguments. More important, however, neither argument has merit. Respondents explicitly raised and discussed the question of whether petitioner's written report was protected "speech" under *Pickering* in their District Court Trial Brief, and again raised the question of whether petitioner's report constituted protected speech in their two motions for directed verdict. Similarly, under Fed. R. Civ. P. 8(e)(2), parties are explicitly permitted to raise alternative or inconsistent defenses at trial. Petitioner's claim that respondents had to concede that petitioner's "speech" caused his demotion in order to claim that the "speech" was unprotected under *Pickering* is the logical equivalent of claiming that a defendant must concede liability in order to contest the amount of damages. It is scarcely surprising that petitioner cites not a line of authority to support his waiver arguments.

B. The Factual Record and Jury Verdict Justify the Court of Appeals' Conclusion that Petitioner's Written Report Disrupted Ongoing Working Relationships and Reflected Upon his Competency and Ability to Perform his Job

Petitioner's primary substantive challenge to the Court of Appeals' conclusion that his "speech" was unprotected under the *Pickering* balancing test is based on his argument that the facts from which the Court of

Appeals drew its conclusion were inconsistent with the facts found by the jury. Petitioner does not argue that the Court of Appeals erred by following this Court's holding that whether the First Amendment protects government employees against adverse action based on their speech presents a question of law and requires an appellate court to make an independent examination of the whole record, *see, e.g., Rankin v. McPherson*, ___ U.S. ___, 107 S.Ct. 2891, 2897 n. 9 (1987); *Connick*, 461 U.S. at 150 & n. 10. Petitioner argues, rather, that the jury's verdict in favor of petitioner and against the City means that the jury found the County Attorney's accusations against petitioner to be groundless and in bad faith and found the assertions of Fire Chief Jones and City Manager Pyle that they demoted petitioner because of the disruptive effects of his "speech" to be similarly pretextual. He further argues that the Court of Appeals' legal conclusions must be overturned as inconsistent with these putative jury determinations of historical fact.

The factual findings that the jury's verdict can reasonably be understood to encompass, however, do not support the factual picture that petitioner would paint. By instructing the jury that petitioner's "speech" was protected as a matter of law, and that whether his conclusion of arson was true or false was not an issue in the case, the District Court took most of the factual issues away from the jury. With respect to the City's liability, the jury had only to determine that petitioner's report was a substantial factor in his demotion and that he would not have been demoted for some reason unrelated to his report. Those findings were virtually compelled by the evidence: it could scarcely be found that petitioner's

report was not a substantial factor in his demotion in the face of respondents' claims that petitioner was demoted because his report disrupted harmonious working relationships and reflected poorly on petitioner's competence. With respect to the County Attorney's motives, the jury was asked to determine nothing: neither the County Attorney nor the governmental unit for which he worked were defendants in the case. The jury *was* asked to assess the Fire Chief's and City Manager's decision to demote petitioner, but its answer to that question flatly rejected petitioner's contention that the ostensible basis for the demotion was phony: the people who decided to demote petitioner were found to have acted reasonably and in subjective good faith. Petitioner's assertion that "[t]he facts recited by the [en banc Court of Appeals] are the opposite of what the jury found," Petition for Certiorari, p. 30, is simply false.

C. The Court of Appeals Gave Appropriate Weight to the Fact that Petitioner's "Speech" Was Made In An Official Report That It Was His Job to Make

Petitioner makes two attacks upon the legal reasoning (as opposed to factual analysis) that the Court of Appeals used in striking the *Pickering* balance. His first attack is based on assertions that the Court of Appeals adopted a *per se* rule under which no official reports are protected under *Pickering*, or weighed the fact that his "speech" was contained in an official report too heavily against him. As to the supposed *per se* rule, this Court should take at face value the Court of Appeals' explicit declaration that it was *not* adopting such a rule. *See* 847 F.2d at 1441-43.

Nor did the Court of Appeals give the fact that petitioner's speech was made as part of his job *de facto* conclusive effect by ignoring the other factors that have been deemed relevant to the balancing process in *Pickering* and its progeny.[7] The court noted, in particular, the report's detrimental impact on working relationships between petitioner and other people with whom he had to deal as part of his job (the Police Department and other law enforcement agencies and, most notably, the County Attorney), the heightened importance of harmony in the law enforcement context, the fact that petitioner's job was not purely ministerial, but involved the exercise of considerable discretion and professional expertise, and the fact that the report could reasonably be deemed to reflect on petitioner's competence as Fire Marshal. 847 F.2d at 1451-52.

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7. The factors relied on by the Court of Appeals are all well supported in First Amendment case law. The government's interest in promoting harmonious working relationships has been recognized in numberless cases, *see, e.g., Pickering*, 391 U.S. at 570; *Connick*, 461 U.S. at 151-52; *Rankin v. McPherson*, ___ U.S. at ___, 107 S.Ct. at 2899, as has the heightened interest in regulating employee conduct in law enforcement or other agencies organized along paramilitary lines, *see, e.g., Germann v. Kansas City*, 776 F.2d 761, 764 (8th Cir. 1985), *cert. denied*, 479 U.S. 813 (1986); *cf., e.g., Kelley v. Johnson*, 425 U.S. 238 (1976), the heightened interest in regulating the conduct of employees who have discretionary or professional duties, as opposed to merely ministerial ones, *see, e.g., Rankin*, ___ U.S. at ___, 107 S.Ct. at 2900, and the heightened interest in regulating speech that reflects poorly on the speaker's fitness for his job, *see, e.g., Pickering*, 391 U.S. at 573 n.5; *Rankin*, ___ U.S. at ___, 107 S.Ct. at 2899.

To be sure, the fact that petitioner's speech was contained in an official report that petitioner made in the ordinary course of his job was given considerable weight by the Court of Appeals in striking the *Pickering* balance against him. That approach does not represent some unprecedented judicial usurpation of power, as petitioner would have it, but just reflects ordinary common sense, already recognized in cases such as *Egger v. Phillips*, 710 F.2d 292 (7th Cir.) (en banc), *cert. denied*, 464 U.S. 918 (1983). It is obvious that a government employer's interest in regulating "speech" that is part of an employee's job is heightened: an employer can scarcely evaluate the job performance of an employee whose job is to speak without evaluating the "speech." Would this Court suggest that the First Amendment forbade an individual Justice to fire or discipline one of his or her law clerks based on the "speech" contained in a memorandum that failed to cite relevant authorities known to the law clerk and contradicting the memorandum's conclusion? Hardly. Yet that is the precise analogue of what petitioner would have this Court hold: he is asking this Court to rule that the First Amendment forbade his superiors from acting on a report that reflected negatively on important aspects of his performance as a Fire Marshal.

D. In its *Pickering* Analysis the Court of Appeals Properly Weighed the Actual Disruptive Effect of Petitioner's Report, Rather Than the Hypothetical "Inherent" Disruptive Effect of Such a Report

Petitioner's second attack upon the Court of Appeals' *Pickering* analysis is based on the bizarre notion, ostensibly gleaned from *Pickering* itself, that what counts for First Amendment balancing purposes is not the actual

disruptive effect of a given speech, but the abstract "inherent" disruptive effect of the speech. In general, says petitioner, reports which conclude that fires are caused by arson don't enrage County Attorneys; he thus suggests that the Court of Appeals should have analyzed the case as if County Attorney O'Sullivan had greeted petitioner's report with equanimity.

Petitioner's argument misses the point of the passages from *Pickering*, 391 U.S. at 570-71, on which it is supposedly based. The point that Justice Marshall was making in *Pickering*, by analogy to the common law of libel, was that a school teacher could not be fired for erroneous public criticisms of certain school board policies when there was no evidence that the criticisms either actually harmed the schools in some way or were of such a nature as to be deemed harmful per se, just as, under the common law of libel, a plaintiff could not recover damages for a defendant's false statements about him unless he established either actual harm to his reputation or false statements that by their nature could be presumed to harm his reputation ("libel per se"). Justice Marshall was not saying, as petitioner now interprets him, that the only harmful statements that matter are those that are, in petitioner's words, "inherently" harmful, any more than, under the common law of libel, only libel per se was actionable.

Nor does petitioner's argument make any sense as a matter of policy. The issue at bar is not whether the non-party County Attorney infringed petitioner's First Amendment freedoms, but whether the City, through its Fire Chief and City Manager, did. In making their judgment as how best to promote the public's interest in the

efficient identification and prosecution of arsonists, Fire Chief Jones and City Manager Pyle were not dealing with the platonic ideals of a County Attorney and a Fire Marshal: they were dealing with the flesh and blood County Attorney and Fire Marshal. The public interest did not permit them the luxury of pretending that there was no problem between petitioner and the County Attorney, while watching the pursuit of arsonists grind to a halt until one of the antagonists cried uncle. The public interest, rather, demanded that they act. They solved their problem, reasonably and in good faith, so the jury held, by demoting petitioner into a position that did not involve contact with the County Attorney. They had to act in the real world; their conduct should be judged accordingly.

II. The Court of Appeals Did Not Err in Concluding that Petitioner's Intragovernmental Report Was Not Speech on a Matter of Public Concern Within the Meaning of *Connick v. Myers*, 461 U.S. 138 (1983)

A. The Issue of Whether Petitioner's Report Was Speech on a Matter of Public Concern Under *Connick* is Moot Because the Court of Appeals Held that Petitioner's Report Was Not Protected Under the Pickering Balancing Test

Respondents will demonstrate *infra* that the Court of Appeals correctly determined that petitioner's report on the cause of the fire did not constitute speech on a matter of public concern within the meaning of *Connick v. Myers*, 461 U.S. 138 (1983). Yet even if the Court of Appeals' decision on the *Connick* issue were wrong (as it is not), that hypothetical error would itself merit no correction,

because it would not affect the Court of Appeals' affirmance of the District Court's judgment in favor of respondents. That is because the conclusion that any given example of government employee "speech" is on a matter of public concern does not imply that the "speech" is protected under the First Amendment in the sense that adverse employer decisions may not be based on the "speech."

To qualify as protected speech, rather, speech deemed to be on a matter of public concern must still pass the *Pickering* balancing test. *See, e.g., Rankin,* ___ U.S. at ___, 107 S.Ct. at 2898-99; *Connick,* 461 U.S. at 150-51. Because the Court of Appeals explicitly determined that petitioner's report failed the *Pickering* balancing test, and was therefore not protected "speech," its resolution of the threshold public concern test is moot.

B. Petitioner's Report Was Unprotected Under *Connick* Because it Was Not on a Matter of Public Concern

In *Connick,* this Court recognized that the reaction of government employers to employee expression not on issues of public concern should not be subjected to scrutiny in the name of the First Amendment, but that "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary." 461 U.S. at 146. To illustrate the "public concern" threshold test it was adopting, this Court posed a dichotomy, keyed to the facts of the case before it:

> "When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of personal interest, absent the most unusual circumstances, a federal court is

> not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."

Id. at 147.

This threshold test, which removes many employer-employee disputes from First Amendment purview, was premised on several informing rationales. Foremost among these was the recognition that the line of cases which effectuated the demise of Justice Holmes's famous dictum that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman," *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892), and which culminated in *Pickering, all* involved this court's rejection of government "attempts to suppress the rights of public employees to participate in public affairs," and reflected "the Constitution's special concern with threats to the right of citizens to participate in political affairs." 461 U.S. at 144-45. *Connick's* secondary rationale was the recognition that the purpose of public employee First Amendment law should be to "ensure that citizens are not deprived of fundamental rights by virtue of working for the government" and not to provide public employees with a "grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State." *Id.* at 147.

In light of *Connick's* informing rationales, it is not surprising that in literally every one of this Court's post-*Pickering* public employee cases where the "speech" involved was deemed of public concern, it related to "political" matters in the broad sense that encompasses

the evaluation, commentary, critique, or proposed change of governmental or similar social institutions. *See Perry v. Sindermann*, 408 U.S. 593 (1972) (testimony before legislative committee in favor of elevating junior college to four year status); *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977) (public criticism of teacher dress code supposedly promulgated to enhance public support for bond issues); *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979) (private criticism of racially discriminatory school policies); *Connick* (implicit criticism of pressure to work on political campaigns); *Rankin* (criticism of Reagan administration cutbacks in social welfare programs).

Similarly, the Circuit Courts of Appeals have universally interpreted the *Connick* threshold as requiring that employee speech, to qualify for potential protection as involving "public concern," must relate to an evaluation, commentary, critique, or proposed change in government performance or policies. *See, e.g., Daniels v. Quinn*, 801 F.2d 687, 690 (4th Cir. 1986)("matters of public concern for [*Connick*] purposes must relate to wrongdoing or a breach of trust, not ordinary matters of agency policy."); *Callaway v. Hafeman*, 832 F.2d 414, 416 (7th Cir. 1987)(speech not having social or political change as its goal "will be afforded less protection generally, and specifically when viewed in the context of public employment cases"); *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983)(speech not of public concern if it "would be of no relevance to the public's evaluation of the performance of governmental agencies").

Under the prevailing interpretations of the *Connick* public concern test, then, petitioner's purely internal

report, prepared for the eyes of the County Attorney, which criticized no one, exposed no governmental wrongdoing, and was useless as an index of government performance, does not qualify for First Amendment protection. Plaintiff was not a whistleblower when he wrote his report. He may have become one after his demotion, when he sought his revenge against the people who had caused that demotion, but his post-demotion comments were never at issue in the District Court. The *only* "speech" that petitioner claimed was protected by the First Amendment and the *only* speech that the District Court's instructions permitted the jury to consider was petitioner's official report.

Petitioner, however, espouses a different, highly formalistic interpretation of *Connick*. Unmooring Justice White's language from its policy and factual underpinnings, and focussing on one term from each side of the *Connick* dichotomy ("public concern" and "personal interest"), he suggests that employee speech gets past the *Connick* hurdle merely if it is of general public interest, and not just of parochial concern. Under this "public interest" test the press becomes the ultimate arbiter of a statement's *Connick* status, and the archetypal speaker on matters of public concern is no longer the whistleblower or political reformer, but the gossip columnist.

Of course, petitioner's notion that newsworthiness is the ultimate test of what is and isn't protected by the First Amendment has been flatly rejected by the courts, *see, e.g., Egger*, 710 F.2d at 317, perhaps because, as one noted First Amendment commentator has put it, "a classification that bases the right to First Amendment protection on some estimate of how much general interest there is in the communication is surely in conflict with the

whole idea of the First Amendment." T. Emerson, *The System of Freedom of Expression* 554 (1970). This Court should not waste a precious opportunity for review on a moot interpretation of *Connick*, especially when the alternative interpretation urged by petitioner represents the antithesis of prevailing First Amendment jurisprudence.

CONCLUSION

The decision of the en banc Court of Appeals for the Tenth Circuit that petitioner wishes to reverse is correct, utterly mainstream, highly fact bound, and remarkable only because of the bizarre analyses of the panel majority and en banc dissent. It is a wholly unworthy candidate for this Court's discretionary review by writ of certiorari: The Court should pass on to the more significant cases on its docket.

Respectfully Submitted,

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No. 88-368

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

THOMAS G. KOCH,
Petitioner,
Versus
CITY OF HUTCHINSON, KANSAS, ET AL.,
Respondents.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner submits the following reply brief, pursuant to Rule 22.5. Petitioner incorporates the factual statement, jurisdiction statement, and reasons for allowance of the writ set out in his petition. As additional **REASONS FOR ALLOWANCE OF THE WRIT** petitioner submits the following responsive points.

1. Petitioner's Claim That Respondents Waived The Pickering Balance Is Not Untimely.

Respondents suggest that petitioner has waived the right to challenge the *en banc* majority's opinion because it purported to conduct the *Pickering* balancing. Petitioner challenges that ruling, in part, because respondents never properly or timely raised a claim that the nature of petitioner's

speech, in context, was inherently disruptive. Instead, the record reflects that respondents *denied* that petitioner's speech had anything to do with his demotion. And, respondents maintained that position *until* the jury rejected the claimed reason for the demotion. Then, for the first time, respondents claimed that the *speech* was disruptive, and that they were entitled to a *Pickering* balance. The trial court never reached the issue in its post-trial rulings because it found that the speech was not on a matter of public concern and hence not protected. The original panel of the Tenth Circuit did not address the *Pickering* balance. When *en banc* review was granted, it was granted *only* on the question of whether the speech was on a matter of public concern. (See Petition, Appendix "B".)

Thus, it was not until the *en banc* opinion was issued that the *Pickering* balancing was conducted. *A fortiori* petitioner could not have raised it before then. And, as a matter of fact, during oral argument *en banc*, counsel for petitioner vigorously opposed any such balancing (in light of the brief and argument of respondents *en banc* which indicated that respondents were urging the *Pickering* balancing). It is sheer sophistry to suggest, on this record, that petitioner should have--or indeed, could have--raised an objection to the balancing done by the *en banc* majority before the petition with this Court.

2. The Courts' Appellate Review Does Have Limitations.

Petitioner contends that the *en banc* majority erred in retrying the facts earlier tried by a jury. Respondents answer by suggesting that there is no limit on any appellate court in a First Amendment public employment case in reviewing the record. Respondents base this assertion on language by this Court indicating a duty to examine the statements and issue and circumstances under which they were made to insure that they "are of a character which the principles of the First Amendment ... protect". *E.g., Rankin v. McPherson*, 107 S.Ct. 2891, 2897 (1987).

Petitioner submits that notwithstanding this duty by appellate courts, there is a

limitation on review. Certainly this Court has never intended to hold that a jury verdict on underlying facts in First Amendment cases should be completely disregarded by an appellate court. That is the conclusion that respondents urge. The language of this Court indicates that there is a limitation on review. Thus, for instance, in *Rankin*, this court stated:

> Our view of these determinations [that the speech was or was not a matter of public concern] *is limited in this context* by our constitutional obligation to assure *that the record supports this conclusion*: "'we are compelled to examine for ourselves the statements in issue and the circumstances under which they [were] made to see whether or not they ... are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.'" *Connick, supra*, 461 U.S., at 150, n. 10, 103 S.Ct., at 1692, n. 10, quoting *Pennekamp v. Florida*, 328 U.S. 331, 335, 66 S.Ct. 1029, 1031, 90

> L.Ed. 1295 (1946) (footnote omitted).

107 S.Ct. at 2897; emphasis added. Thus, even though the inquiry is whether the speech is protected, or whether the statements are the type to be protected by the First Amendment, the level of review does not appear to be different from that level allowed or appropriate on any other appeal. In other words, the only inquiry is whether there is record support for the conclusion reached at the trial court level. This does not appear to obligate or entitle an appellate court to completely retry facts determined by a jury.

In *Rowland v. Mad River Local School Dist.*, 105 S.Ct. 1373 (1985), in a dissenting opinion where a petition for writ of certiorari was denied, Justice Brennan,

joined by Justice Marshall, suggested that a limitation existed when an appellate court reviewed a First Amendment case. In that case a public high school employee was fired because she was a homosexual who revealed her sexual preference. A jury found that she was punished because she was bisexual and told her secretary and some fellow teachers that she was bisexual, and not for "any other reason". 105 S.Ct. at 1374. The jury also found that her mention of her bisexuality did not in any way interfere with petitioner's performance of her duties or with the operation of the school generally. Upon the jury's verdict, the trial judge entered judgment. The Sixth Circuit reversed, finding in part that the speech was not a matter of public concern. Justices Brennan and Marshall of this Court

criticized that holding, stating:

> Petitioner did not lose her job because she disrupted the school environment or failed to perform her job. She was discharged merely because she is bisexual and revealed this fact to acquaintances at her work place. *These facts are rendered completely unambiguous by the jury's findings. Yet after a jury and the trial court who heard and evaluated the evidence rendered verdicts for petitioner, the court below reversed* based on a crabbed reading of our precedents *and unexplained disregard of the jury and judge's factual findings.* Because they are so patently erroneous, these manuevers suggest only a desire to evade the central question: may a State dismiss a public employee based on her bisexual status alone? I respectfully dissent from the Court's decision not to give its plenary attention to this issue.

105 S.Ct. at 1375; emphasis added. Thus, it appears that at least two members of this Court consider a disregard of findings of the jury to be "patently erroneous".

Respondents suggestion that appellate review can include a complete retrying and reweighing of facts should be rejected by this Court.

Respondents treat the issue as though they are still arguing their case to a jury. For instance, in their brief in opposition, respondents make arguments to the effect that petitioner is not entitled to immunity in non-speech misconduct just because he engages in speech otherwise that may be protected. The question before this Court is not whether or not petitioner misconducted himself on the job. The question before this Court is whether, in the name of conducting the constitutional review of the record to insure that the speech is the type to be protected, an appellate court can retry the facts, and in

this case disregard the jury's finding that Koch did not engage in misconduct on the job as respondents alleged throughout the trial, and indeed throughout this case.

Respondents contend that the jury did not decide the disruptiveness issue. Of course, no one decided the disruptiveness issue under *Pickering* before trial, because respondents did not raise it. However, that conduct which respondents have alleged was disruptive by Koch--that is his non-speech conduct--most certainly was decided by the jury under the *Mount Healthy* "but for" phase of the case. Clearly through the trial respondents contended that Koch's demotion resulted from his misconduct which respondents contended was disruptive and created disharmony. Just as clearly, in finding that Koch would not have been

demoted "but for" his speech in his arson report, the jury rejected those contentions by respondents. Now, the *en banc* majority has ignored that rejection by the jury, and has accepted respondents' contentions that non-speech conduct was disruptive, and on the weight of that acceptance has found that under *Pickering* the balance tips in respondents' favor as though it were his speech that was disruptive.

3. The Speech Itself--Not Non-Speech Conduct--Must Be Disruptive For Pickering To Apply.

In their opposition brief, respondents suggest that petitioner is asking the Court to consider the speech in a vacuum. Respondents treat petitioner's position as though petitioner is saying that the speech

must be disruptive out of context and *per se*. This is not petitioner's position. Petitioner fully recognizes that the speech must be considered in its full context in order to answer the questions of (a) whether the speech is on a matter of public concern and (b) whether the speech is inherently disruptive. But, petitioner does contend that it must be the *speech* that is disruptive; and, *Pickering* does not apply if either (a) non-speech conduct is alleged to have been disruptive or (b) a hostile or antagonistic reaction of persons who do not like the speech, to the speech, causes disruption. Placing respondents' factual contentions in the absolute best light for them, the most they can claim is that disruption arose when the county attorney and others did not like Koch's speech, and

had an adverse reaction to it. It cannot be suggested that the speech here was of a nature that it inherently disrupted Koch's relationship with his superiors and other agencies or interfered with Koch's duties. This Court has held, in *Rankin*, and in *Pickering*, that the necessary disruption to render the speech unprotected cannot be the disruption that arises because persons hearing the speech do not like the speech and reacts in an adverse or disruptive fashion.

In this Court's most recent statement on the *Pickering* issue, the Court made it clear that it is the speech itself which must be disruptive. In *Rankin*, in its discussion of the *Pickering* balancing, for instance, this Court stated that "*Pickering* next requires that we balance McPherson's

interest *in making her statement* against 'the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.'" 107 S.Ct. at 2898; emphasis added. And this Court said that "[w]hile McPherson's *statement* was made at the work place, there is no evidence that *it* interfered with the efficient running of the office." 107 S.Ct. at 2899; emphasis added. And the Court stated:

> Nor was there any danger that McPherson had discredited the office by making her *statement* in public. McPherson's *speech* took place in an area to which there was ordinarily no public access; *her remark* was evidently made in a private conversation with another employee. There is no suggestion that any member of the general public was present or heard McPherson's *statement*. Nor is there any evidence that employees other than Jackson who worked in the room even heard the *remark*. Not only was McPherson's

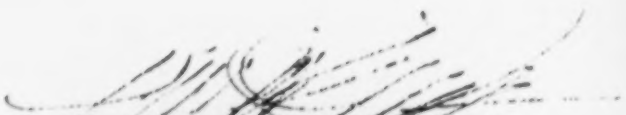
> discharge unrelated to the functioning of the office, it was not based on any assessment by the constable that the *remark* demonstrated a character trait that made respondent unfit to perform her work.

Id.; emphasis added. It is clear that this court makes a distinction between speech which is inherently disruptive in context, on the one hand, and non-speech conduct which may justify adverse employment actions. It is the statement or speech itself which must, in context, be inherently disruptive. That claim was not made here and that claim is not supportable here.

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the above and foregoing **PETITIONER'S REPLY BRIEF** have been served upon the

following counsel of record by placing same in the United States Mail, properly addressed and postage prepaid, on the 10th day of October, 1988: Mr. Robert L. Howard, Esq., 700 Fourth Financial Center, Wichita, Kansas 67202; Mr. Philip H. Alexander, Esq., Post Office Box 1567, 125 E. Ave. B, Hutchinson, Kansas 67501; and, Mr. James M. Kaup, Esq., General Counsel, League of Kansas Municipalities, 112 W. 7th St., Topeka, Kansas 66603.



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